Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1979

No. 79-1741

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON,

*Petitioners,*

R. G. P. INCORPORATED, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Respondents (Petitioners on separate petitions),*

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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*Petitioners,*

R. G. P. INCORPORATED, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Respondents (Petitioners on separate petitions),*

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OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 15, 1980.

## OPINIONS BELOW AND OF THIS COURT

The following opinions of courts in this case have been rendered:

The opinion of this Court, dated June 20, 1979, upon certiorari to the Eighth Circuit (Nos. 78-160, 78-161), is reported, *Wilson v. Omaha Indian Tribe, et al.,* 442 U. S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979), and is reproduced in the Appendix to this Petition for Certiorari.

The opinion of the Court of Appeals for the Eighth Circuit dated January 15, 1980 on remand from the United States Supreme Court is reported, *Omaha Indian Tribe v. Wilson, et al.,* 614 F. 2d 1153, and is reproduced in the Appendix to this Petition for Certiorari.

The Memorandum Opinion and the Findings of Fact and Conclusions of law of the District Court for the Northern District of Iowa are reported, *United States v. Wilson,* 433 F. Supp. 57 and 67 respectively. They are reproduced in Appendix B (Page 1 Findings, Page 51, Conclusions), and Appendix C (Opinion) to the previous Petition for Certiorari filed in this case by Wilson, et al. (No. 78-160).

The first opinion of the Court of Appeals for the Eighth Circuit was dated April 11, 1978. It is reported, *Omaha Indian Tribe v. Wilson, et al.,* 575 F. 2d 620. It is reproduced as Appendix A to the previous Petition for Certiorari filed in this case by Wilson, et al. (No. 78-160).

Hereinafter the appendix to this petition will be referred to as App. and the Appendices to the previous petition for certiorari (No. 78-160), as App. A, App. B, etc.

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit to which this Petition is directed was entered on January 15, 1980. A timely petition for rehearing with suggestion that rehearing be *in banc* was filed on January 29, 1980, and denied on February 8, 1980 (App. 49). This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. Code § 1254 (1).

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## QUESTIONS PRESENTED FOR REVIEW

One of the two questions upon which this Court previously granted certiorari is "whether the Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in this case." This Court held that federal law is controlling, but that the law of Nebraska should be borrowed as the federal rule of decision in this case, not federal common law as the Eighth Circuit had held, and this Court remanded this case to the Court of Appeals to consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts in this case. On remand the Court of Appeals held that Nebraska law is the same as what it previously said was federal common law—that rapid accretion is in law avulsion; that to have an avulsion it is not necessary that any fast land be cut off from one bank of the river and become attached to the other, identifiable, in place, or that the river abandon its

old bed and acquire a new one, but that there may be an avulsion within the bed, i. e., where the thalweg passes over or around a sandbar or piece of shore, and that even that piece of riverbed need not be identifiable. This decision of the Court of Appeals is contrary to the law of Nebraska as established by numerous decisions of its Supreme Court. Because of its erroneous view of Nebraska law, the Court of Appeals held that the District Court did not correctly interpret the Nebraska law and did not properly apply it to the facts in this case. Accordingly, there are presented for review the following questions:

1. Whether the Court of Appeals erred in holding that the District Court did not correctly interpret the Nebraska law of accretion and avulsion.

2. Whether the Court of Appeals erred in holding that the District Court did not properly apply the Nebraska law of accretion and avulsion to the facts in this case.

3. Whether the Court of Appeals erred in setting aside the findings of the District Court as "clearly erroneous" within the meaning of Federal Rule of Civil Procedure 52 (a).

Under its former grant of certiorari in this case this Court construed 25 U. S. Code § 194 but did not consider its constitutionality and should now determine—

4. Whether Title 25, U. S. Code § 194, putting the burden of proof on "the white person" in a suit by "an Indian", is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian tribes against all other races and de-

prives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 52(a).

> • • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. • • •

United States Code, Title 25, § 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

Derivation. Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause.

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

## STATEMENT OF THE CASE

This case is a consolidation of suits, brought by the Omaha Indian Tribe and the United States as trustee for that Tribe, to quiet title to certain Iowa farm land as being part of the Omaha Indian Reservation, which was established on the Nebraska side of the Missouri River pursuant to a treaty of 1854.

The complaint of the Tribe invoked the jurisdiction of the District Court under 28 U. S. Code §§ 1331 and 1362. The complaint of the United States invoked the jurisdiction of the District Court under 28 U. S. Code § 1345.

The District Court found for the defendants, petitioners herein, on their counterclaims. The Eighth Circuit reversed.

This case was previously before this Court pursuant to its grant on November 13, 1978, of the Petition for Certiorari of petitioners Wilson, et al., (No. 78-160) limited to Questions 2 and 3 presented by the petition, and its grant of the petition for certiorari of the State of Iowa, (No. 78-161) limited to Questions 1 and 4 presented by its petition. The Iowa Questions 1 and 4 were similar to the Wilson Questions 2 and 3 which are:

> "2. Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.
>
> "3. Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case."

In its opinion, this Court construed 25 U. S. Code § 194 to be applicable to place the risk of nonpersuasion

upon the defendants in this case excepting the State of Iowa; found federal law of accretion and avulsion was controlling but that the law of Nebraska should be borrowed as the federal rule of decision in this case; and this Court remanded this case to the Court of Appeals to consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts in this case.

As stated in our introduction to the "Questions Presented" in this petition, the Court of Appeals on remand asserted that Nebraska law is not what the District Court found it to be, but is the same as what in its previous opinion the Court of Appeals had said was federal law. Accordingly, it again vacated the judgment of the District Court, which quieted title in defendants, and remanded the case to that Court with directions to enter judgment quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Tribe.

The differences between the Nebraska law as determined by the District Court, and the Nebraska law as determined by the Court of Appeals may be summarized as follows:

The District Court said that addition of land to a river bank by deposition of alluvium is accretion regardless of how rapid that deposition may be.[1] The Court

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[1]433 F. Supp. 64, App. C, pp. 13, 14.

of Appeals says that sudden or rapid deposition of alluvium constitutes an avulsion.[2]

The District Court said that for a river movement to be an avulsion the river must abandon its old bed and acquire a new one.[3] The Court of Appeals says a movement of the thalweg within the bed may be an avulsion.[4]

The District Court said that for a river movement to be an avulsion there must be a cut-off of fast land from one bank and its attachment to the other. The Court of Appeals says that is not necessary.

Finally the District Court said that the fast land claimed to have been cut-off must be identifiable after the river movement as the same land existing in the same area before such movement. The Court of Appeals says there doesn't have to be any such identifiable land,[5] or even identifiable shore or sandbar.

The Court of Appeals refuses to recognize the distinction between areas above and those below the ordi-

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[2]App. p. 42, 614 F. 2d 1159. It did not define "rapid" or "sudden" in this context, but since no witness suggested any addition to bank taking place in less than one high water period, deposition in one high water period must be sudden or rapid in the eyes of the Court of Appeals and therefore constitutes an avulsion. Perhaps that Court considers change taking place over eleven years to be sudden, for in its first opinion it said, "it is clear that the thalweg had moved substantially in a relatively short period of time; perhaps as few as three years, but no more than 11 years." 575 F. 2d 645, App. A, p. 61, 62).

[3]433 F. Supp. 90, App. B, p. 57.

[4]App. p. 42, note 8, 614 F. 2d 1159.

[5]App. p. 42, 614 F. 2d 1159.

nary high water mark;[6]; between fast land[7] and riverbed[8]; between land on or above the bank[9] and the low sandy point bar,[10] between islands[11] and mere sandbars.[12]

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[6]The ordinary high water mark is the line to which high water ordinarily reaches, coordinate with the limit of the bed of the river and below which the action of the water has destroyed the value of the soil for agricultural purposes. *Borough of Ford City v. United States,* 345 F. 2d 645 (CA 3, 1965), c. d. 382 U. S. 902, 115 L. Ed. 2d 156; *State, ex rel. O'Connor, Attorney General, et al. v. Sorenson, et al.,* 222 Iowa 1248, 271 N. W. 234 (1937).

[7]Fast land includes the river bank and other land above the ordinary high water mark of the river. *Howard v. Ingersoll,* 54 U. S. 381, 428, 13 How. 381, 428, 14 L. Ed. 189; and *Hayes v. State,* Ark., 496 S. W. 2d 372, 374 (1973).

[8]The bed of the river is the area between its banks below the ordinary high water mark, including channels, shores and sandbars, but not islands. *Howard v. Ingersoll,* 54 U. S. 381, 428, 13 How. 381, 428, 14 L. Ed. 189 (1851); *State of Oklahoma v. State of Texas,* 43 S. Ct. 221, 225, 260 U. S. 606, 67 L. Ed. 428 (1923); *Barr v. Spalding,* D. C. Ky. 46 F. 2d 798, 800 (1928); *U. S. v. Ray,* C. A. Fla., 423 F. 2d 16, 20 (1970); *Hayes v. State, Ark.,* 496 S. W. 2d 372, 374 (1973); *Houghton v. C., D. & M. R. Co.,* 47 Iowa 370.

[9]The banks of a river are fast land which contain the river at its high flow. The area between the banks is the bed of the river. *Howard v. Ingersoll,* 54 U. S. 381, 428, 13 How. 381, 428, 14 L. Ed. 189 (1851).

[10]The shore is that part of the river bed adjoining the bank below the ordinary high water mark but above the low water mark and thus exposed above the water surface much of the year. *Barr v. Spalding,* D. C. Ky., 46 F. 2d 798, 800 (1928); *State v. Gerbing,* 47 So. 353, 356, 56 Fla. 603 (1908); *Brickell v. Trammell,* 82 So. 221, 227, 77 Fla. 544 (1919); *Sundial Ranch v. May Land Company,* 119 P. 758, 762, 61 Ore. 205 (1912).

[11]An island is a body of fast land entirely surrounded by water. *Summerville v. Scotts Bluff County,* 183 Neb. 311, 154 N. W. 2d 517 (1967); *Mather v. State,* 200 N. W. 2d 498 (Iowa 1972); *Crow v. Johnston,* 209 Ark. 1153, 194 S. W. 2d 193, 197

(Continued on next page)

As the Nebraska Supreme Court pointed out in *Summerville v. Scotts Bluff County,* 182 Neb. 311, 154 N. W. 2d 517 at 522, quoting *Whitaker v. McBride,* 197 U. S. 510, 25 S. Ct. 530, 49 L. Ed. 857, sandbars are frequently found in western waters, and are of temporary duration, existing today and gone tomorrow.

Additional facts are stated in the argument regarding the application of Nebraska law to the facts in this case.

———o———

## REASONS FOR GRANTING THE WRIT

**Whether the District Court has correctly interpreted Nebraska law of accretion and avulsion is an important question of state law which the Court of Appeals for the Eighth Circuit has decided in a way in conflict with the applicable law of Nebraska.**

This Court directed the Court of Appeals to determine whether the District Court correctly interpreted Nebraska law and properly applied it to the facts in this case. In purporting to do so the Court of Appeals has refused

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(Continued from previous page)

(1946); *Belle Fontaine Improvement Company v. Niedringhaus,* 181 Ill. 426, 55 N. E. 184 (1899).

[12]A sandbar is a portion of the river bed which is below the ordinary high water mark but which is above the water surface part of the time. When exposed, it may be part of the river shore attached to the bank or may be surrounded by water. *Mather v. State,* 200 N. W. 2d 498 (Iowa 1972).

to follow the decisions of the Supreme Court of Nebraska, but has misinterpreted the Nebraska law of accretion and avulsion, and if its decision is allowed to stand, it will throw great confusion into the law of Nebraska as well as into the law generally on that subject. The fact that this Court remanded this case to the Court of Appeals for its consideration of this question will add great weight as a precedent to the Court of Appeals' opinion if this Court now allows that opinion to stand. This Court, having previously assumed jurisdiction in this case, should now review the action of the Court of Appeals and determine whether it complied with the mandate of this Court or incorrectly interpreted Nebraska law of accretion and avulsion.

To allow this Court of Appeals decision to stand will not only permit a miscarriage of justice with regard to the 2900 acres, the subject of the part of this suit so far tried, but will cause confusion and difficulties with the trial of the heretofore untried portion of this case in which the Omaha Tribe claims an additional 8000 acres which has been possessed and farmed in separate tracts by more than 80 different persons and their predecessors in title for generations.

Because the Court of Appeals says its rule is not only Nebraska law but also federal and general law (misconstruing or ignoring decisions of this Court discussed or referred to commencing at page 14 of this Petition), its opinions, if allowed to stand, will cause difficulties to states, the United States, title insurers, mortgagees, Indian tribes, and landowners in other states as well as to those in Iowa, South Dakota and Missouri which border on Nebraska.

Furthermore, since this Court decided that 25 U. S. Code § 194 is applicable to litigation such as this, this Court should also now decide whether § 194 is constitutional. That question is also of great interest and importance to all of the persons described above.

———o———

## SUMMARY

The Court of Appeals concedes that there was no identifiable fast land (bank or island) or even *identifiable* riverbed (shore or sandbar) left in place as the thalweg in the Blackbird Bend moved west between 1867 and 1879, or as it moved south from the north high bank between 1906 and 1923 or 1927. Nevertheless, it asserts that the defendants failed to sustain their burden of proving accretion because, in the opinion of the Court of Appeals panel, defendants failed to prove that there was no *possibility* that there may have been an avulsion within the bed of the river in which the thalweg suddenly moved with rapid deposition of alluvium behind it, or in which the thalweg of the river may have passed over or around some unidentifiable piece of shore or sandbar without excavating it to some unspecified depth below ordinary high water mark. Such shore or bar would by definition have been below ordinary high water mark to start with.

But under Nebraska law as announced and applied by the Nebraska Supreme Court, there can be no avulsion within the bed of the river. The increase to riparian land by deposition of alluvium is always gradual and imperceptible no matter how rapid its deposit, and is legal ac-

cretion. And to create an avulsion the river must abandon its old bed and adopt a new one, cutting off fast land between its old and new beds, which land remains identifiable after the change of beds as the same land existing in the same area before such change.

Applying Nebraska law to the "possible" fact situation suggested by the Court of Appeals, the defendants sustained their burden of proving accretion by much more than a preponderance of the evidence.

Even if shore and sandbars were fast land, the Court of Appeals would not be entitled under Federal Rule of Civil Procedure § 52 (a) to set aside the trial judge's findings that such shore and bars were all completely obliterated and washed away as the thalweg moved west and south and were replaced by the deposit of alluvium behind it. These findings were thoroughly supported by documentary evidence and lay and expert testimony, which the trial judge found more credible than the evidence presented by the plaintiffs. His findings, supported as they are by such evidence and by his inspection of the land in controversy, are entitled to great weight and the Court of Appeals is not entitled to disregard them, but it did.

Although this Court's opinion (App. 27, 442 U. S. 653, 678, 61 L. Ed. 2d 153, 173, 99 S. Ct. 2529, 2535) seemed to give the Court of Appeals a broad hint that applying 25 U. S. C. § 194 should make no difference since the trial court found that defendants had carried the normal burden of persuasion, had proved accretion by a preponderance of the evidence, and had observed that his findings and conclusions would not be altered by any different allocation of the burden of persuasion, the Court of Appeals

in its second opinion stresses Section 194 and apparently considers that it puts a burden on the defendants of proving accretion beyond the possibility of a doubt. If there is any merit in the Court of Appeals' position on this point, then it would seem that this Court should determine whether or not Section 194 is unconstitutional because it is an invidious racial discrimination in favor of Indians against nonIndians.

———o———

## ARGUMENT

### 1. The Court of Appeals' interpretation of Nebraska law is contrary to Nebraska law of accretion and avulsion as determined by that State's Supreme Court.

#### A. Nebraska Law—Accretion—The deposition of alluvium is always gradual and imperceptible regardless of how fast it may be deposited.

A set of facts which the Eighth Circuit panel would call an avulsion within the bed, but which the Nebraska Supreme Court held to be accretion was presented in *Wiltse v. Bolton, et al.*, 132 Neb. 354, 272 N. W. 197 (1937). Plaintiff claimed the land in controversy as accretion to his riparian land. Defendant alleged avulsion. Judgment for defendant reversed. There the Court said:

> We have carefully examined all of the evidence in this case and are convinced that the action of the river in the spring of 1908 was *not an avulsion, but the shift-*

> *ing of the main channel from the east to the west side of the river bed,* and that the lands in controversy were formed by accretion, and not by an avulsion. (Emphasis supplied.)

There is no evidence, opinion or other, of any change in the river in the case at bar more rapid and sudden than the shift in the main channel in *Wiltse* from one side of the riverbed to the other in one high water period caused by an ice gorge.

The Court of Appeals does not attempt to distinguish or even mention *Wiltse v. Bolton.* The Court of Appeals does attempt to distinguish a similar one high water ice gorge case, *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942), on the ground that no party pleaded avulsion (App. 42, note 7, 614 F. 2d 1159 note 7). In *Conkey,* the Court said (8 N. W. 2d 541, 542):

> . . . The record does not disclose from what land, if any, the area was *cut off* by avulsion, or the situation existing from which it might be reasonably inferred that it could be *identified as the same* land. . . . Some contention is made that it was river-bed land which had accreted to the high bank by the filling in of alluvial deposits which appeared as the water gradually receded. But we do not think this distinction is important, as the rules governing accretions would be applicable in any event.
>
> . . . where a stream, which is a boundary, from any cause suddenly *abandons its old and seeks a new bed,* . . . This sudden and rapid change of channel is termed, in the law, 'avulsion.'
>
> . . . The fact that the river sought a *different channel* as the waters receded is *not* of itself *sufficient* to sustain a finding that an avulsion occurred. (Emphasis supplied.)

Some Nebraska cases commenting on the rapidity of formation of land by accretion on the Missouri River are the following: *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906), vacating 74 Neb. 573, 104 N. W. 1061 (1905),

> ". . . whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion."

*DeLong v. Olsen, et al.,* 63 Neb. 327, 88 N. W. 512 (1901), cited *Nebraska v. Iowa,* 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) in support of the proposition that the law of accretion applies to the Missouri River notwithstanding the changes are more rapid and extensive than in most other rivers.

In *Lieneman v. Sarpy County,* 145 Neb. 382, 392, 16 N. W. 2d 724, 729 (1944), the Court cited *Nebraska v. Iowa* (1892), for the proposition that accretion no matter how rapid is always gradual and imperceptible, and said:

> ". . . we are not concerned with the rapidity of the movement of the right bank westward. . . ."

**B. Nebraska Law — Avulsion — Change of Beds, Cut-off, Identifiability.**

In *Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 610, 148 N. W. 328, 329 (1914), the trial court found for the plaintiff on its contention that the land was in Nebraska and had been put on the east side of the Missouri river by an avulsion, but found for the defendant on his claim of title by adverse possession. To define the issue between accretion and avulsion the Court quoted from the opinion in *Coulthard v. Davis,* 101 Iowa 625, 70 N. W. 716, as follows:

> Whether this land has been added in such a way as to be accretion, or whether it has been added by a sudden and *entire change in the river, detaching* this body of land from the west bank of the river, and *attaching* it to what was formerly the east bank of the river, in such a way as that it is *capable of identification,* is the question we are called upon to determine. (Emphasis ours.)

This quotation states three closely related elements of which an avulsion is composed, which have been referred to in numerous Nebraska Supreme Court cases. They are (1) abandonment of the old bed and acquisition of a new one, (2) the cut-off of the intervening fast land from one *bank* (not a piece of the bed of the river), and its attachment to the other bank, and (3) the identifiability of the cut-off land.

When a river abandons its old bed and acquires a new one, it necessarily cuts off the bend which was the old bed and cuts off the land between that old bed and the new bed, and when the bank land is so cut off, it remains identifiable by the nature of its soil, its vegetation, its comparative surface level, and any man-made structures or installations such as surveyor's markers, fences, etc.

In defining "avulsion", the Nebraska cases refer to one or more of the above elements of avulsion.

In *First National Bank v. McFerrin,* 142 Neb. 627, 9 N. W. 2d 167 (1943), the Court said (9 N. W. 2d at 172):

> In denial of the contention of the plaintiff on this issue the defendant adduced evidence that the lands in question cannot be *identified* as lands *cut off* from Nebraska by avulsion.
>
> * * *

> . . . we are convinced that the trial court erred in refusing to submit this controverted issue to the jury.

In several other places in the McFerrin opinion the Court in referring to avulsion used the words "cut off" and "identifiable":

> "It becomes clear then that the parties are in accord on the proposition that, if this is *identifiable* land *cut off* by avulsion, it never was during any period in question a part of the domain of the State of Iowa." (9 N. W. 2d 169, 7 N. W. 2d 176).
>
> * * *
>
> "The parties here do not question that at that time the land in issue here, if it was then subject to *identification,* was not within the Iowa boundaries." (9 N. W. 2d 169).
>
> "It appears then, assuming that the land in question here was *cut off* from the territory of Nebraska by avulsion. . . ." (7 N. W. 2d 177).
>
> * * *
>
> ". . . if it shall be shown that these lands were *cut off* . . ." (7 N. W. at 178). (Emphasis ours.)

Additional cases defining "avulsion" using the expressions "cut-off", "identifiable," "identified," "identification" and "abandons its old and seeks a new bed" include: *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647 (1935); *Lieneman v. Sarpy County,* 145 Neb. 382, 392, 16 N. W. 2d 724, 729 (1944); *Durfee v. Keiffer,* 168 Neb. 272, 95 N. W. 2d 618 (1959); *Conkey v. Knudsen,* 141 Neb. 517, 4 N. W. 2d 290 (1942); *Valder v. Wallis,* 196 Neb. 222, 242 N. W. 2d 112 (1976); *Frank v. Smith,* 138 Neb. 382, 293 N. W. 329 (1940); *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906); and *Bouvier v. Stricklett,* 40 Neb. 792, 59 N. W. 559 (1894).

The Court of Appeals recognized that many Nebraska cases, relied upon by the District Court, emphasize identifiable land in place in defining avulsion, and it cited no Nebraska case to the contrary. Nevertheless it insisted that identifiable land is not a necessary element of avulsion under Nebraska law (575 F. 2d at 635, note 30; App. 43, note 8, 614 F. 2d 1159 note 8).

**Island Rule.**

In support of its contention that there may be an avulsion within the bed of the river, i. e., without the river abandoning its old and seeking a new bed, the Court of Appeals panel relies on the island rule, namely, that where there is an island in a river and the flow of the river in the main channel diminishes and that in the lesser channel increases so that the latter becomes the main channel without the island being eroded away, the ownership of and jurisdiction over the island does not change, and the boundary line remains in the middle of the former main channel. The island rule is sometimes called an exception to the rule of accretion, *Commissioners v. U. S.*, 270 F. 110, 113 (CA8, 1920) and sometimes called "a situation to which the law of avulsion applies," *Durfee v. Keiffer,* 168 Neb. 272, 195 N. W. 2d 618, 624 (1959). Islands are above the ordinary high water mark and are not part of the river-bed, so the island rule gives no support to the Court of Appeals' contention that there may be an avulsion within the riverbed.

The present case involves no islands. However, the Court of Appeals attempts to extend the island rule to riverbed, seeking support from the case of *State v. Eck-*

*lund,* 147 Neb. 508, 23 N. W. 2d 782 (1946) (App. 39, 43, 614 F. 2d 1157 and 1159), which the Court of Appeals says was a case "in which title to old riverbed land bared by a river's gradual change in channel was retained in accordance with the original boundary line, as is the case in avulsion." The Court of Appeals implies that the "old riverbed land" was still riverbed when the change of channel occurred. But that was not the case. By "old riverbed" the Nebraska court obviously meant former riverbed. Before the change of channel occurred, the area involved had become an island. It was described in the opinion as "relicted, and is covered with willows and brush and good grass for pasture" (23 N. W. 2d at 787, 789) and the Court said:

> The thread of the stream, flowing on the north side when each of the parties hereto secured their land, did not gradually move over the *subsequently formed* intervening lands that were formed to the south thereof. However, the south branch of the river flowing south of Ware Island did finally become the main channel, *but this was subsequent to the formation of the land herein involved,* and the true boundary line between the respective riparian owners remains the line of the thread of the stream where it formerly ran in the north channel. (Emphasis supplied.)

The change in the main channel from the north to the south of the land in controversy occurred subsequently to that area having become an island, growing good grass for pasture. It was not then riverbed. *Ecklund* is simply an application of the island rule to an island. It does not support the Court of Appeals' theory that there may be an avulsion within the bed of the river.

As noted by this Court in its opinion (App. 9, note 12; 442 U. S. 653, 663, 99 S. Ct. 2529, 2535, 61 L. Ed. 153, 163):

> The Court of Appeals relied on two cases, *Veatch v. White,* 23 F. 2d 69 (CA 9 1927), and *Uhlhorn v. U. S. Gypsum Co.,* 366 F. 2d 211 (CA 8 1966), cert. denied, 385 U. S. 1026 (1967), in concluding that, under federal law, "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." 575 F. 2d at 637.

Since it really found no support in Nebraska cases, the Court of Appeals reasons that Nebraska has followed federal precedents and therefore would follow *Veatch* and *Uhlhorn.* The facts in *Veatch* are unclear. In *Uhlhorn,* the Eighth Circuit panel made an exception to the rule that there may be no avulsion within the bed of the river because the area involved, although it was described as below the ordinary high water mark at the time it was cut off by creation of a new bed and channel by dredging by the U. S. Engineers, it was nevertheless, when so cut off, to quote from the Court of Appeals' opinion, a "massive land mass . . . infrequently submerged . . . solid and compact . . . as discernable, intact and identifiable after the channel change as it was before . . . did not suffer erosion. . . ." The area involved in this case is quite the opposite,—frequently submerged, readily erodable, not identifiable. There is no reason to think that the Nebraska Supreme Court would consider that *Uhlhorn* is a precedent for holding that an avulsion (or five or six of them) would exist if a factual situation similar to the present case were presented to it.

This theory of the Court of Appeals that there may be an avulsion within the bed of the river is impossible to reconcile with the established law of Nebraska and with the realities of the movements of the wild Missouri river. If the area in question were fast land, either bank land or island, before the river movements involved, it could no longer be deemed the subject of an avulsion if it were to be eroded down below the ordinary high water mark. When that happens it becomes riverbed, *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 720 (1959); *Summerville v. Scotts Bluff County,* 182 Neb. 311, 154 N. W. 2d 517 (1967), and the person who owned it before its erosion will continue to own it only if he still owns the Bank, and if as such riparian owner he owns the bed of the river to the thalweg (as in Nebraska but not in Iowa) and if the area in question continues to be on his side of the thalweg. Otherwise he loses ownership of such former bank land which has become riverbed. But according to the Court of Appeals, if the area in question was already below the ordinary high water mark before the movement of the thalweg, then when the thalweg moves around or over it, "within the bed of the river" it is to be considered an avulsion unless it is proven that there was no possibility that such riverbed was not completely disintegrated—eroded to some depth, the Court of Appeals doesn't say what depth, below the ordinary high water mark. How totally impracticable this rule of the Court of Appeals is, is made apparent by consideration of the nature of sandbars, that

they "are of temporary duration, existing today and gone tomorrow." *Summerville v. Scotts Bluff County,* 182 Neb. 311, 154 N. W. 2d 517, quoting from *Whitaker v. McBride,* 197 U. S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905).[13]

The rule that the boundary will be the thalweg except in case of a cut-off of a bend is a practicable rule. The Court of Appeals' rule is not.

**C. The Nebraska Supreme Court decisions are consistent with federal and general common law of accretion and avulsion—the Eighth Circuit panel's decision in this case is not.**

In *County of St. Clair v. Lovingston,* 23 Wall. (90 U. S.) 46, 23 L. Ed. 59 (1874) the Court defined accretion [alluvion] as follows:

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[13]See also Appendix S of the Annual Report of the Chief of Engineers for 1881, by Major C. R. Suter (W. Ex. XX, Tribe's Ex. 65, R. 1800, 1801) where it is stated with respect to the Missouri River at p. 1652 (quoted by District Court in its findings, App. B, pp. 11, 12; 433 F. Supp. 72): "The enormous amount of material thus precipitated into the river, together with that scoured from the bed, causes the formation of innumerable bars, which, even at high water, obstruct navigation. These bars are constantly in motion, their position and shape changing from day to day. The channels through them are also changing both in depth and location, rendering navigation correspondingly uncertain. Owing to the incessant bank erosion the river is steadily increasing the width between high banks, as the bars which are formed opposite caving shores take time to build up to the general level, and are meanwhile liable to be themselves attacked and swept away. The erosion which usually occurs on the upper sides of points, causes these points to move bodily down stream. Where the erosion is more rapid than the bar growth below, the point disappears, . . . ."

> "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

To that definition the Supreme Court added a gloss in its very extensive discussion of accretion and avulsion in *Nebraska v. Iowa,* 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892). It there pointed out that accretion, the deposition of alluvium, no matter how rapid, is always gradual and imperceptible within the meaning of its legal definition. The Court said (143 U. S. 359, 369, 12 S. Ct. 396, 399, 36 L. Ed. 186, 190):

> "The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. . . . There is, no matter how rapid the process of subtraction *or addition,* no detachment of earth from the one side and deposit of the same opon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is the *rapidity* of the change caused by the velocity of the current; and this in itself, in the very nature of things, works *no change in the principle* underlying the rule of law in respect thereto." (Emphasis ours.)

The case of avulsion "noticed hereafter" was a neck cut-off. The Court said (143 U. S. 359, 370, 12 S. Ct. 396, 400, 36 L. Ed. 186, 190):

". . . in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion."

The Court in *Nebraska v. Iowa* (1892) also defined "avulsion." It said:

"It is equally well settled, that where a stream which is a boundary, from any cause suddenly *abandons its old and seeks a new bed*, such change of channel works no change of boundary; . . ." (143 U. S. 359, 361, 12 S. Ct. 396, 397, 36 L. Ed. 186, 188).

Quoting *Vattel*, the Court continued:

". . . in the *very uncommon* case called avulsion where the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner *that it can still be identified*, the property in the soil so removed naturally continues vested in its former owner."

• • •

". . . if, instead of a gradual and progressive change of its bed, the river . . . *turns entirely out of its course* and runs into one of the two neighboring states, the *bed which it has abandoned* becomes thenceforward their boundary. . . ." (Emphasis ours.) (143 U. S. 359, 365, 12 S. Ct. 396, 398, 36 L. Ed. 186, 189).

Thus, the Court made it clear that when a boundary river changes its course by erosion of one bank and deposition of alluvion to the other, no matter how rapid, such deposition constitutes legal accretion, and the boundary remains the middle of the main channel notwithstanding the fact that the channel has moved. On the other hand where the river suddenly abandons its old bed and secures an entirely new bed thus separating fast land from one bank

and attaching it to the other in such manner that it can still be identified as the same land, as when the river, having formed an ox-bow bend cuts through the neck of the meander lobe, that action constitutes an avulsion and the boundary remains in the middle of the abandoned river bed, and the ownership of the cut-off land remains the same.[14]

The Court of Appeals tortures *Nebraska v. Iowa* (1892) into merely stressing that to be legal accretion deposition of alluvium must be gradual and imperceptible, instead of stressing that deposition, no matter how rapid, is always gradual and imperceptible.

In its second opinion the Court of Appeals finds Nebraska law to be the same as it previously found federal law to be.

On the contrary, a review of the Nebraska cases will demonstrate that Nebraska law is the same as the federal law stated in the report of the Special Master which was "in all things confirmed" by this Court in *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), but which the Court of Appeals ignores. This suit involved ownership of an oil well and the right to oil pro-

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[14]*Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) continues to be cited as accepted law by this Court as well as by other federal and state courts, e. g., *Oklahoma v. Texas*, 260 U. S. 606, 637, 67 L. Ed. 428, 435, 43 S. Ct. 221 (1922); *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), Special Master's Report pp. 14, 15, 16; *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 326, 38 L. Ed. 2d 526, 539, 94 S. Ct. 517 (1973) (Overruled on other grounds, *Oregon v. Corvallis*, infra); *Mississippi v. Arkansas*, 415 U. S. 289, 291, 39 L. Ed. 2d 333, 339, 94 S. Ct. 1046 (1974); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375, 50 L. Ed. 2d 550, 561, 97 S. Ct. 502 (1977).

duced from it, the bottom hole of which was under the bed of the Mississippi River and which was on the west or Louisiana side of the thalweg when it first became a producer. Shortly thereafter the thalweg moved across the well location. Louisiana claimed the boundary had become fixed before the well was drilled because of an avulsion in 1950-52 within the bed of the river. The Special Master asked (page 17 of his report):

> Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?

He answered the question in the negative. He said (p. 19):

> The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artifiicial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the "live thalweg" is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible. It is conceivable that the term "sudden" should be applied in a more flexible sense than its use in ordinary conversation. But even conceding the strength of this argument, *we have been unable to find any case,* with facts similar to the instant case, *in which an avulsion has*

> *been found by the Court where the river remains in the same bed of the stream.* In all such cases the new channel was formed when the river "suddenly leaves its old bed and forms a new one * * *." *Arkansas v. Tennessee,* 246 U. S. 158, 173. (Emphasis supplied.)

A review of Nebraska law will demonstrate that it is the same as the basic common law stated in 93 C. J. S. 751, *Waters,* Sec. 76, as follows:

> In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion, but, if the stream changes its course suddenly and *in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified,* it is not accretion. (Emphasis ours.)

Illustrating accretion, the C. J. S. text writer continued:

> Thus, a gravel bar formed during a flood on the bank of a stream is the result of accretion and not of an avulsion, even though a gravel bank on the opposite bank caved in during the flood and was carried by the action of the water in the direction of the new bar.

**2. The Court of Appeals erred in holding that the District Court did not properly apply the Nebraska law of accretion and avulsion to the facts in this case.**

"Part III. Application of Law to Facts" of the Court of Appeals' second opinion starts out (App. 46, — F. 2d —):

> Even assuming the district court properly interpreted Nebraska law, nonetheless our review of the record demonstrates the district court findings are clearly erroneous. Even if it be assumed that identifiable land in place is the *sine qua non* of avulsive movement, the

> evidence of identifiable land in place or the lack thereof is simply too inconclusive, too dependent on speculation and conjecture, to support the inference of accretive change.

But the Court of Appeals in its first opinion seems to concede that there was no identifiable fast land or even identifiable shore left in place as the river channel moved in its bed from east to west between 1867 and 1879. The Court said (575 F. 2d at 641, App. A., p. 43):

> It is conceded that the eastern end of the Barrett Survey was made up of sandy material. Thus, even if the river changed by avulsive movements through the end of the meander lobe, the land remaining in place would have been low and composed of sand.

As to the movement of the river southward from the north high bank of the Blackbird Bend area between 1906 and 1923, the Court of Appeals said (575 F. 2d 649, App. A, pp. 62, 63):

> . . . after 1890 as the river moved in a northerly direction alluvion soil subject to frequent inundation was deposited throughout much of the area. Thereafter, when the river moved southwesterly away from the northerly high bank, either by accretion or as the result of avulsion, this sandy area would not reveal any conspicuous identifiable features.

**"Possibility" that fragment of sandbar not obliterated.**

Again with reference to Barrett's low sandy point, the Court of Appeals said, "Although it is possible that Bar C [on the 1879 map, App. p. 52], may have completely eroded. . . . The record also supports the *possibility* that Bar C was the same surface area described by Barrett. . . ." (App. A, p. 44, 575 F. 2d 641). (Emphasis ours.)

Again with reference to Bar C and others bars of 1879 the Court of Appeals said (App. A, p. 49, 575 F. 2d 643):

> The parallel positioning of Bars A, B, C, and D, while perhaps characteristic of accretion, could have resulted from the accretion which followed as an effect of avulsion as well.

And in footnote 59 of its first opinion (App. A56, 575 F. 2d at 646), the Court of Appeals said:

> Assuming that the 1890 map shows stabilized accretion land, as the District Court found, it is *plausible* that the "accretion" may have formed from deposition of sediment resulting from a sudden and perceptible shift in the thalweg. (Emphasis supplied.)

Accretion which follows as a result of avulsion is nevertheless accretion. *Lieneman v. Sarpy County,* 145 Neb. 382, 392, 16 N. W. 2d 724, 729 (1944); *Louisiana v. Mississippi,* 384 U. S. 24, 16 L. Ed. 330, 86 S. Ct. 1250 (1966) Special Master's Report.

Because the defendant's evidence did not convince the Court of Appeals that there was no *"possibility"* that Bar C of 1879 was a remaining fragment of Barrett's low sandy point of 1867 which had not been completely disintegrated, as the thalweg moved west between those dates, and that there was no *"possibility"* that some sandbar that may have been deposited after 1890 on the Nebraska side of the thalweg as the river moved north may not have been completely disintegrated as the thalweg moved back to the south and west, the Court of Appeals says that the District Court finding that the defendants sustained their burden of proving accretion is clearly erroneous. But defendant's burden was to prove accretion only by a preponderance of the evidence, not beyond any possibility of

a doubt, as implicitly held by this Court (App. 27, 442 U. S. 653, 678, 61 L. Ed. 153, 173, 99 S. Ct. 2529, 2535).

Since the only serious suggestion of avulsion made by the Court of Appeals is that there were avulsions within the bed of the river, it follows that the District Court properly applied the Nebraska rule that there can be no avulsion within the bed of the river, and properly concluded that defendants sustained their burden of proving accretion.

**3. Whether a Court of Appeals may disregard Federal Rule of Civil Procedure 52 (a) and substitute its findings for those of the District Court is an important federal question which the Eighth Circuit panel decided in a way in conflict with applicable decisions of Courts of Appeals for other circuits and of this Court, and with previous Eighth Circuit decisions.**

Even if the Court of Appeals were entitled to treat shore sandbars as riparian fast land and to treat sandbars surrounded by water as islands, it would nevertheless not be entitled to hold that the District Court's findings of accretion and its judgment for defendants were clearly erroneous within the meaning of Federal Rules of Civil Procedure § 52 (a).

The District Court found (App. B, p. 28; 433 F. Supp. 79) that "by 1879 the action of the Missouri river had completely obliterated and washed away the meander lobe as surveyed by Barrett to" the stub shown on the 1879 map (App. 52) as still attached to the Nebraska bank, and found that in its southern migration from the northern high

bank it likewise eroded all land in its path, depositing alluvium behind it. The District Judge was "satisfied that no other conclusion is tenable from the evidence in this case." (App. B, p. 45; 433 F. Supp. 85).

The District Judge's findings were based in part on the testimony of defendants' expert witnesses whose opinions the Court found more credible than those of plaintiff's experts, but the finding of accretion was supported by much additional evidence.

**Short summary of accretion evidence.**

Statements of facts in this case are contained in the previous petition for certiorari of Wilson et al. (No. 78-160), pages 7-10, and in the Wilson et al. brief, pages 14-17, and reply brief, pages 14-20. We will not repeat here those fact statements but will here substitute an even more abbreviated statement which we think will suffice for this petition.

According to its surveyor, Barrett, who meandered the Nebraska shore in May of 1867 after the April rise had subsided and before the June rise, the low sandy point in 1867 was frequently inundated, worthless for cultivation, readily erodable and likely to be eroded (Barrett's field notes, Tribe's Ex. 26 d and e, R. 21, 22).

The upper limb of Blackbird Bend eroded downstream noticeably between the 1867 (App. p. 50) and 1875 (App. p. 51) maps showing the destruction of the point to be progressing.

The destruction of the low sandy point reflected in the 1879 map (App. p. 52) left no cut-off lake or other indicia

of avulsion. The pre-existing chute remained and did not become the channel.

The Monona County, Iowa, Surveyor, surveyed the eastern Blackbird Bend area in 1894 as accretion to Iowa riparian land.

No documentary evidence indicating any avulsion was ever discovered.[15]

The southward migration of the river from the north high bank and correlating erosion of the Nebraska bank progressed about a mile south between 1907 and 1908 eroding about 400 acres of Indian allotted lands by October of 1908 (Wilson Ex. R, R. 535, 592). West Bank erosion continued until after 1923, the sliver of Barrett survey area shown on the 1923 map as remaining west or south of the thalweg having disappeared before the survey for the 1927 U. S. Engineer's map was made.

Some of the area now occupied by Iowa land was in 1867 occupied by fast land on the Nebraska bank of the river and before 1906 it had been allotted to Indians, and some of it fee patented and out of trust. The erosion of this land between 1906 and 1927 was thoroughly documented by correspondence obtained by discovery procedures from the Bureau of Indian Affairs files in which the allottees relinquished their allotments in exchange for new allotments because their original allotments had been or were in the process of being washed down the river. See

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[15]The total absence of any known historical reference to an avulsion in the area was cited as important evidence that there was none in *Mississippi v. Arkansas*, 415 U. S. 289, 293, 39 L. Ed. 2d 333, 94 S. Ct. 1046 (1974); likewise in *Bone v. May*, 208 Iowa 1094, 225 N. W. 367 (1929).

Wilson Exs. A through P (R. 104, 106, 110), F4 (R. 2059, 2061), and R (R. 535, 592). The Court of Appeals concedes the erosion of this bank land (Court of Appeals 4/11/78 Opinion, App. A, pp. 60, 62, 575 F. 2d 648, 649).

In 1916, Joe Kirk built a log cabin on the bar land south of land on the north high bank which he owned.

George W. Prichard, now a retired Iowa District Judge, observed the area frequently while hunting along the river from 1909 to 1913 when, as he testified, it was a mere sandbar forming in the river. By 1919 when he toured the area on horseback with Joe Kirk the northern and obviously older part was usable for crop land, but the land was lower and wetter farther south and not yet capable of cultivation. There were no large trees, but such trees as there were were smaller as one went south. Judge Prichard saw nothing to indicate that any of the land had been land in place transferred to the Iowa side from the Nebraska side of the river. He saw only new bar land.

In a suit filed in 1928 with decree entered in 1929, the Court quieted title to much of the area as being accretion to the land of Joe Kirk on the north Iowa high bank.

Based on their very extensive knowledge of the behavior of wild rivers, including the Missouri, and on their study of the land, its topography, its vegetation, its soil, and all maps available and hydrological data, it was the opinion of Huber, Hallberg and Kennedy, each an extremely well qualified expert, that all of the Barrett survey area and any accretions thereto were completely eroded away and washed down the river, and that the land now in the Blackbird Bend area is all accretion to the Iowa riparian land.

**District Court's findings entitled to great weight.**

In addition to the foregoing, the District Judge devoted one of the twenty-one trial days to inspecting the Blackbird Bend area and in particular those topographical features which the parties deemed most significant. Even the Supreme Court of Nebraska which, unlike Federal Courts of Appeal, reviews equity cases *de novo,* in determining the weight of the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying, and "when the court views the topography of a certain locality, its findings are entitled to great weight." *Worm v. Crowell,* 165 Neb. 713, 87 N. W. 2d 384 (1958); *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647, 649 (1935); *Wemmer v. Young,* 167 Neb. 495, 93 N. W. 2d 837 (1958); *Winkle v. Mitera,* 195 Neb. 821, 241 N. W. 2d 329 (1976).

In view of the evidence we submit that even treating the low sandy point and any other bars that may have arisen on the Nebraska side of the thalweg as fast land instead of shore, the District Court's findings that all such were completely eroded away and obliterated and then replaced by the river by accretion to the Iowa riparian land, cannot rightly be termed clearly erroneous. On the contrary, they are clearly supported by a preponderance of the evidence.

As a reason for giving little weight to the findings of the District Court the Court of Appeals said that those findings were "essentially a memorandum written by the defendants" . . . "mechanically adopted" (App. A, note 21, pp. 23, 24, 575 F. 2d 632), and "In reviewing this finding our task is not made easier by the District Court's ver-

batim adoption of defendant's analysis of the evidence and proposed findings of fact including the defendant's credibility assessments of the witnesses (App. A, p. 39, 575 F. 2d 639).

Judge Bogue prepared Findings of Fact and Conclusions of Law (App. B), a written Opinion (App. C), and a Decree (App. D). The 21-page Opinion is entirely the handiwork of Judge Bogue. Of the Conclusions of Law (App. B, 51-61), Judge Bogue adopted defendants' proposed Conclusions in part and rejected them in part. He made seven deletions from defendants' proposed Conclusions and five additions, some quite lengthy. Of the 11 pages,[16] six full pages plus 53 lines on four other pages are Judge Bogue's language. The remainder, much less than half the space occupied by Judge Bogue's Conclusions, were adopted from defendants' proposed Conclusions. Of the Findings of Fact (App. B, 2-51), there were 21 different parts of defendants' requested Findings which Judge Bogue omitted from 12 different pages of his Findings. There were 30 parts of 21 pages which Judge Bogue added to defendants' proposed Findings. These insertions of findings not requested by defendants amount to 184 printed lines, equivalent to six pages. Actually, the extensive revisions the District Judge made in the defendants' proposed findings demonstrate that he was unwilling to adopt proposed findings unless satisfied that they were correct, not merely in general but also in detail.

The holding of the Court of Appeals that it may set aside the findings and decree of the District Court because

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[16]We refer to pages and lines as printed in the above appendices, not as printed in 433 F. Supp. 57 and 67.

of the "possibility" that they might be mistaken is contrary to the decisions of this Court.

In *U. S. v. Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949), this Court held that a choice by the trier of facts between two permissible views of the weight of the evidence is not clearly erroneous where the evidence would support a conclusion either way.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969), this Court held that in applying the clearly erroneous doctrine, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo;* the authority of the appellate court is circumscribed by the deference it must give to the decisions of the trier of fact who is usually in a superior position to appraise and weigh the evidence.

The holding of this Eighth Circuit panel is likewise contrary to the decisions of Courts of Appeals for other circuits. See, *Dickens v. U. S.*, (CA 5, 1977), 545 F. 2d 866; see also, *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, (CA 5, 1975), 506 F. 2d 960; *Parmer v. National Cash Register Co.*, (CA 6, 1974), 503 F. 2d 275; *Rochez Bros., Inc. v. Rhoades*, (CA 3, 1975), 527 F. 2d 880, 38 A. L. R. Fed. 709; *Ahern v. Veterans Administration*, (CA 10, 1976), 537 F. 2d 1098; *Pampillonia v. Concord Line*, A/S, (CA 2, 1976), 536 F. 2d 476; *U. S. v. Second National Bank*, (CA 5, 1974), 502 F. 2d 535; *Snodgrass v. Nelson*, (CA 8, 1974), 503 F. 2d 94; *Indiana State Employees v. Negley*, (CA 7, 1974), 501 F. 2d 1239; and *U. S. v. One Twin Engine Beech Airplane*, (CA 9, 1976), 533 F. 2d 1106.

An accretion case involving this point is *Beaver v. U. S.,* (CA 9, 1965), 350 F. 2d 4, 7, c.d. 383 U. S. 937, where the Court said:

> Appellants complain that eyewitness testimony to the character of the river's change was almost nonexistent, and, as a result, the parties and the trier of fact below were required to rely on old maps, aerial photographs and "theoretical reconstruction by hydrologists or engineers." . . . once there exists substantial and valid evidence to enable the trier of fact to conclude that an accretion has taken place the issue cannot here be raised, unless that conclusion is clearly erroneous. For example, Exhibit 10 depicts the river as south of the subject land as of 1930. That evidence alone, we assume, would be sufficient upon which to base a finding of fact.

From the Eighth Circuit itself a pertinent case is *Matthews v. McGee,* 358 F. 2d 516 (8th Cir. 1966), where the District Court had found that a movement of the Arkansas River involved accretion, not avulsion. The following is from the opinion by Blackmun, J.:

> The defendants also state, "The opinion of the District Court * * * presents a concise statement of the nature of the conflicting evidence." Judge Young himself observed, p. 305 of 241 F. Supp.:
>
> "Obviously all of the testimony cannot be reconciled. Much of the testimony concerns old River surveys, opinions, speculation and surmise by witnesses of what may have occurred many years ago. Of all this testimony, the Court thinks that of Mr. Smith the most persuasive."
>
> By Rule 52 (a), Fed. R. Civ. P., findings of fact made by the court are not to be set aside unless clearly erroneous, that is, "only upon clear demonstration that they are without substantial evidentiary support or

that they are induced by an erroneous view of the law." Cole v. Neaf, 344 F. 2d 326, 329 (8th Cir. 1964).

So we submit that the Court of Appeals has failed to properly carry out the mandate of this Court because:

(1) the Court of Appeals finds only, avulsions within the bed of the river, and under Nebraska law no movement of the thalweg merely over or around portions of the river-bed will constitute an avulsion, and

(2) even if fast land—bank land instead of shore, island instead of sandbars—were involved, the District Court's findings could not be deemed clearly erroneous, and the Court of Appeals is in error in holding them so.

**4. Whether Title 25, U. S. Code § 194, putting the burden of proof on the "white person" in a suit by "an Indian" as now construed by this Court is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian Tribes against other persons and deprives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment, is an important question of federal law which has not been, but should be, settled by this Court.**

This question was presented in the previous petitions for certiorari in this case but the grant of certiorari was limited to two other questions. However, from questions or comments by Justices during the oral argument we gained the impression that one or more members of this Court were of the opinion that this constitutional question is controlled by this Court's decision in *Morton v. Man-*

*cari,* 417 U. S. 535, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974). That case involved a preference in employment in the Bureau of Indian Affairs, given by statute to members of "federally recognized" Indian tribes. Footnote 42 of the opinion of Powell, J. in *Regents of the University of California v. Bakke,* 438 U. S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) at 438 U. S. 304, describes *Mancari* as follows:

> Petitioner also cites our decision in *Morton v. Mancari,* 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis. Id.* at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion." Ibid.

In *Mancari,* this Court said (417 U. S. 535, 554, 41 L. Ed. 2d 290, 303, 94 S. Ct. 2474, 2484 (1974):

> Here, the preference is reasonable and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Unlike the *Mancari* preference, the § 194 discrimination is racial. It is not reasonably and directly related to any legitimate non-racially based goal, does not further the cause of Indian self-government or make the BIA more responsive, and we submit that it is clearly a proscribed form of racial discrimination.

For further discussion of this point see the previous petition for certiorari of Wilson et al. in this case (No.

78-160) pp. 11-18, the petition for certiorari of RGP, Inc. et al. in No. 78-162, the amicus brief of Indiana and twenty-eight other states in support of Iowa's petition for certiorari (No. 78-161) pp. 7-10, the amicus brief of California in support of Iowa's Petition (No. 78-161) pp. 7-13 and the amicus brief in support of the three petitions for certiorari (Nos. 78-161, 162 and 163) filed by Gordon Dahl and 81 other farm owners in Monona County, Iowa, pp. 6-10.

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## CONCLUSION

Having directed the Court of Appeals to determine whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts in this case, this Court should now follow through on this case and decide whether the Court of Appeals has properly performed the task assigned to it, or has erroneously determined Nebraska law, erroneously applied the law to the facts, and erroneously disregarded Rule 52 (a) of the Federal Rules of Civil Procedure by unjustifiably setting aside the findings of the District Court. And since the Court of Appeals appears to find that 25 U. S. Code § 194 places a greater burden of persuasion on litigants opposing Indian Tribes than proof by a preponderance of the

evidence, this Court should determine the question of the constitutionality of that section.

The writ should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1979

No. 79-1741

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson,

*Petitioners,*

R. G. P. Incorporated, Otis Peterson, Travelers Insurance Company, State of Iowa and State Conservation Commission of the State of Iowa,

*Respondents (Petitioners on separate petitions),*

vs.

Omaha Indian Tribe and United States of America,

*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

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Omaha Indian Tribe and United States of America,

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

# Supreme Court of the United States

Nos. 78-160 and 78-161

Roy Tibbals Wilson et al.,
Petitioners,

78-160 vs.

Omaha Indian Tribe et al.

State of Iowa et al.,
Petitioners,

78-161 vs.

Omaha Indian Tribe et al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

[June 20, 1979]

MR. JUSTICE WHITE delivered the opinion of the Court.

At issue here is the ownership of a tract of land on the east bank of the Missouri River in Iowa. Respondent Omaha Indian Tribe, supported by the United States as trustee of the Tribe's reservation lands,[1] claims the tract

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[1]In *Heckman v. United States,* 224 U. S. 413 (1912), the Court explained the source and nature of this trust relationship. In the exercise of its plenary authority over Indian affairs, Congress has the power to place restrictions on the alienation of Indian lands. Where it does so, it continues guardianship over Indian lands and "[d]uring the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. . . . A transfer of the [Indian land] is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Id.,* at 437-438. Accordingly, the United States is entitled to go into court as trustee to enforce Indian land rights. "It [is] not essential that it should have a pecuniary

as part of reservation lands created for it under an 1854 treaty. Petitioners, including the State of Iowa and several individuals, argue that past movements of the Missouri River washed away part of the Reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian landowners.[2]

Two principal issues are presented. First, we are faced with novel questions regarding the interpretation and scope of 25 U. S. C. § 194, a 145-year-old, but seldom used, statute that provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Second, we must decide whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive.

## I.

In 1854 the Omaha Indian Tribe ceded most of its aboriginal lands by treaty to the United States in exchange for money and assistance to enable the Tribe to cultivate

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interest in the controversy." *Id.*, at 439. See also *Morrison v. Work*, 266 U. S. 481, 485 (1925); *Choate v. Trapp*, 224 U. S. 665, 678 (1912); F. Cohen, Handbook of Federal Indian Law 94-96 (1942).

[2]The State of Iowa claims title to certain lands deeded to it by quitclaim and to the bed of the Missouri between the thalweg (see n. 3, *infra*) and the ordinary high water mark, any islands formed in that portion of the river, and any abandoned channels. The latter claims are based upon the equal footing doctrine, see *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), and the 1943 Boundary Compact between Iowa and Nebraska, see n. 6, *infra*.

its retained lands. Treaty of March 16, 1854, 10 Stat. 1043; see *United States v. Omaha Indians*, 253 U. S. 275, 277-278 (1920). The retained lands proved unsatisfactory to the Tribe, and it exercised its option under the Treaty to exchange those lands for a tract of 300,000 acres to be designated by the President and acceptable to the Tribe. The Blackbird Hills area, on the west bank of the Missouri, all of which was then part of the Territory of Nebraska, was selected. The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg.[3] That land as modified by a subsequent treaty and statutes,[4] has remained the home of the Omaha Indian Tribe.

In 1867, a survey by T. H. Barrett of the General Land Office established that the reservation included a large

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[3]The term is commonplace in boundary disputes between riparian States. See, e. g., *Minnesota v. Wisconsin*, 252 U. S. 273, 282 (1920):

"The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

[4]Treaty of March 6, 1865, 14 Stat. 667; Act of June 22, 1874, 18 Stat. 146, 170; Act of August 7, 1882, 22 Stat. 341; see also Act of March 3, 1885, 23 Stat. 362, 370, as amended by Act of January 7, 1925, 43 Stat. 726.

peninsula jutting east toward the opposite, Iowa, side of the river, around which the river flowed in an oxbow curve known as Blackbird Bend.[5] Over the next few decades the river changed course several times, sometimes moving east, sometimes west.[6] Since 1927, the river has been west of its 1867 position, leaving most of the Barrett survey area on the Iowa side of the river, separated from the rest of the reservation.

As the area, now on the Iowa side, dried out, Iowa residents settled on, improved, and farmed it. These non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs.

Four lawsuits followed the seizure, three in federal court and one in state court. The Federal District Court for the Northern District of Iowa consolidated the three

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[5]There is some dispute over whether the Barrett survey actually marked the reservation boundary because several years had passed since the Tribe began occupying the reservation and the Missouri may have changed its course during that period. See 433 F. Supp. 67, 69, 74 (ND Iowa 1977). This does not appear to be of significance in the case. *Id.*, at 75.

[6]In *Nebraska v. Iowa*, 143 U. S. 359 (1892), the Court decided a boundary dispute between the States of Nebraska and Iowa caused by the wanderings of the Missouri. "The fickle Missouri River," however, "refused to be bound by the . . . decree," Erickson, Boundaries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927); and in 1943 Nebraska and Iowa entered into a Compact fixing the boundary between the States independent of the river's location. Congress ratified the Compact in the Act of July 12, 1943, ch. 220, 57 Stat. 494. Since the time of the Compact, the Army Corp of Engineers has been largely successful in taming the river. See *Nebraska v. Iowa*, 406 U. S. 117, 119 (1972).

federal actions, severed claims to damages and lands outside the Barrett Survey area, and issued a temporary injunction that permitted the Tribe to continue possession. The court then tried the case without a jury. At trial, the Government and Tribe argued that the river's movement had been avulsive, and therefore the change in location of the river had not affected the boundary of the reservation. Petitioners argued that the river had gradually eroded the reservation lands on the west bank of the river, and that the disputed land on the east bank, in Iowa, had been formed by gradual accretion and belonged to the east-bank riparian owners.[7] Both sides sought to quiet title in their names.

The District Court concluded that state rather than federal law should be the basis of decision. 433 F. Supp. 57 (ND Iowa 1977). The court interpreted the Rules of Decision Act, 28 U. S. C. § 1652, as not requiring the application of federal law in land disputes, even though the

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[7]The District Court stated the common-law rule, 433 F. Supp. 57, 62 (ND Iowa 1977):

"Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647 (1935). On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel. *Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 148 N. W. 328 (1914). The jurisdiction of Nebraska applies these principles to the movements of the Missouri River. *DeLong v. Olsen,* 63 Neb. 327, 88 N. W. 512 (1901)."

This Court has followed the same principles resolving boundary disputes between States bordering on navigable streams. *Arkansas v. Tennessee,* 246 U. S. 158, 173 (1918); *Missouri v. Nebraska,* 196 U. S. 23, 34-36 (1904); *Nebraska v. Iowa,* 143 U. S., at 360-361, 370.

United States and an Indian tribe were claimants,[8] unless the Constitution, a treaty, or an Act of Congress specifically supplanted state law. The court found no indication in those sources that federal law was to govern. It then went on to conclude that 25 U. S. C. § 194 was not applicable to the case because it was impossible for the Tribe to make out a prima facie case that it possessed the disputed lands in the past without proving its case on the merits. Thus, § 194 had no significance because it was "inextricably entwined with the merits." 433 F. Supp., at 66.[9]

Applying Nebraska law,[10] which places the burden of proof on the party seeking to quiet title, the court concluded that the key changes in the river had been accretive, and that the east-bank riparians, the petitioners, were thus the owners of the disputed area. 433 F. Supp. 67 (ND Iowa 1977).[11]

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[8]The District Court relied on *Mason v. United States,* 260 U. S. 545 (1923); *Francis v. Francis,* 203 U. S. 233 (1906); and *Fontenelle v. Omaha Tribe of Nebraska,* 298 F. Supp. 855 (Neb. 1969), aff'd, 430 F. 2d 143 (CA8 1970).

[9]The District Court also suggested that the possessory interest of the Tribe was not of sufficient quality to trigger the burden-shifting contemplated by 25 U. S. C. § 194.

[10]The District Court construed the Court's decision in *Nebraska v. Iowa,* 406 U. S. 117 (1972), as requiring the application of Nebraska law with respect to changes in the river that occurred before 1943, the date of the Iowa-Nebraska Compact that permanently fixed the boundary between the States, because the land at issue here was indisputably part of Nebraska before the river changed its course. 433 F. Supp., at 60, and n. 2.

[11]Although the District Court hewed closely to Nebraska case law, it also observed that insofar as the relevant definitions of avulsion and accretion were concerned, there was no significant difference between Iowa and Nebraska law, except

The Court of Appeals reversed. 575 F. 2d 620 (CA8 1978). It began by ruling that the District Court should have applied federal rather than state law for two distinct reasons. First, the boundary of the reservation was coincidental with an interstate boundary at the time the river moved. Therefore, under *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375 (1977), and other cases of this Court, the governing law is federal because

> "The rendering of a decision in a private dispute which would 'press back' an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law." 575 F. 2d, at 628.

Second, the Court of Appeals construed our decision in *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661, 677 (1974), as requiring the application of federal law because the Tribe asserted a right to reservation land based directly on the 1854 Treaty and therefore arising under and protected by federal law.

The Court of Appeals also ruled that the District Court had erred by refusing to apply 25 U. S. C. § 194. Because the Tribe had proved that the 1854 Treaty included the land area within the Barrett survey it had made a sufficient showing of "previous possession or ownership" to invoke the statute and place the burden of proof

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that under Iowa law accretion was presumed, which was not the case under Nebraska law. Because Nebraska law would not aid the defendants by a presumption of accretion, the Tribe was favored by the application of Nebraska law. The District Court was also of the view that the federal accretion-avulsion law was not substantially different. As we shall see, the Court of Appeals differed with the District Court in this respect.

on petitioners. Adopting the District Court's construction "would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river." 575 F. 2d, at 631.

Reviewing what it perceived to be the federal common law of accretion and avulsion and with no more than passing reference to Nebraska law on the issue, the Court of Appeals concluded that the District Court had based its ruling on a too narrow definition of avulsion.[12] The court then applied the law to the evidence and found that the evidence was in equipoise. Because § 194 placed the burden of proof on the non-Indians, however, the court ruled that judgment must be entered for the Tribe.

We granted separate petitions for certiorari filed by the State of Iowa in No. 78-161 and by the individual petitioners in No. 78-160, but limited to the questions whether 25 U. S. C. § 194 is applicable in the circumstances of this case, in particular with respect to the State of Iowa, and

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[12]The Court of Appeals relied on two cases, *Veatch v. White*, 23 F. 2d 69 (CA9 1927), and *Uhlhorn v. U. S. Gypsum Co.*, 366 F. 2d 211 (CA8 1966), cert. denied, 385 U. S. 1026 (1967), in concluding that, under federal law, "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." 575 F. 2d, at 637. This definition was broader than the Nebraska rule as understood and applied by the District Court, which the Court of Appeals described as follows: "an avulsion occurs only where a sudden shift in a channel cuts off land 'so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed.' " *Id.*, at 634, quoting 433 F. Supp., at 73. As is evident, the definition employed by the Court of Appeals permits a finding of avulsion even where the river is still largely within its original bed.

whether federal or state law governs the substantive aspects of these cases. — U. S. — (1978).[13] We are in partial, but serious, disagreement with the Court of Appeals, and vacate its judgment.

## II.

Petitioners challenge on several grounds the Court of Appeals' construction and application of § 194 to these cases.[14] First, they argue that by its plain language the section does not apply when an Indian tribe, rather than one or more individual Indians, is the litigant. We think the argument is untenable. The provision first appeared in slightly different form in 1822, Act of May 6, 1822, 3 Stat. 683, as part of an Act amending the 1802 Indian

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[13]In No. 78-161, filed by the State of Iowa, the questions on which certiorari was granted were stated as follows:

"Whether the State of Iowa is 'a white person,' and the Omaha Indian Tribe is 'an Indian' within the meaning of 25 U. S. C. § 194.

. . . . .

"Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."

In No. 78-160, we granted certiorari on the following questions:

"Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.

"Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case."

[14]Of these various arguments, only the single ground relied on by the District Court in refusing to apply § 194 was discussed and rejected by the Court of Appeals. The other grounds for holding § 194 inapplicable to this case were presented by petitioners either in their briefs on the merits before the Court of Appeals or their Petition for Rehearing before that court after it reversed the District Court.

Trade and Intercourse Act, Act of March 30, 1802, 2 Stat. 139 *et seq.*, which was one of a series of acts originating in 1790 and designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians.[15] Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions. The 1822 provision was part of this design; and with only slight change in wording, it was incorporated in the 1834 consolidation of the various statutes dealing with Indian affairs. Act of June 30, 1834, 4 Stat. 729 *et seq.* Section 22 of that Act is now 25 U. S. C. § 194, already set out in this opinion. Although the word "Indian" in the second line of § 22 of the 1834 Act replaced the word "Indians" in the 1822 provision, there is no indication that any change in meaning was intended; and none should be implied at this late date, particularly in light of Title I, United States Code, § 1, which provides that unless the context indicates otherwise, "words importing the singular include and apply to several persons, parties or things."

Even construed as including the plural, however, it is urged that the word "Indians" does not literally include an Indian tribe, and that it is plain from other provisions

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[15]The background, history and development of these laws and acts are explored exhaustively in F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834 (1962). See also F. Cohen 68-75.

of the Act that Congress intended to distinguish between Indian tribes and individual Indians. But as we see it, this proves too much. At the time of the enactment of the predecessors of § 194, Indian land ownership was primarily tribal ownership; aboriginal title, a possessory right, was recognized and was extinguishable only by agreement with the tribes with the consent of the United States. *Oneida Indian Nation v. County of Oneida,* 414 U. S., at 669-670. Typically, this was accomplished by treaty between the United States and the tribe, and typically the land reserved or otherwise set aside was held in trust by the United States for the tribe itself. "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *United States v. Jim,* 409 U. S. 80, 82 (1972), quoting *Cherokee Nation v. Hitchcock,* 187 U. S. 294, 307 (1902). It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made by non-Indian squatters on their lands. To limit the force of these provisions to lands held by individual Indians would be to drain them of all significance given the historical fact that at the time of the enactment virtually all Indian land was tribally held. Legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in the light of the common notions of the day and the assumptions of those who draft them." *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191, 206 (1978). Furthermore, "'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca County,* 426 U. S. 373,

392 (1976), quoting *Alaska Pacific Fisheries v. United States,* 248 U. S. 78, 79 (1918).

The second argument, presented in its most acute form by the State of Iowa, is that § 194 applies only where the Indians' antagonist is an individual white person and has no force at all where the adverse claimant is an artificial entity.[16] We cannot accept this broad submission. The word "person" for purposes of statutory construction, unless the context indicates to the contrary, is normally construed to include "corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals." 1 U. S. C. § 1. And in terms of the protective purposes of the acts of which § 194 and its predecessors were a part, it would make little sense to construe the provision so that individuals, otherwise subject to its burdens, could escape its reach merely by incorporating and carrying on business as usual. As we said in *Monell v. New York City Dept. of Social Services,* 436 U. S. 658, 687 (1978), "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory anal-

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[16]Petitioners cite *United States v. Perryman,* 100 U. S. 235 (1880), as support for their position that § 194 must be construed literally to apply only to a "white person," or individual Caucasian. But that case dealt with another provision of the 1834 Nonintercourse Act, § 16, and there were distinct grounds in the legislative history indicating that the term "white person" as used in § 16 did not include a Negro. Whether *Perryman* would be followed today is a question we need not decide.

ysis."[17] It stands to reason that in re-enacting this provision, first in the Revised Statutes and then in the United States Code, Congress was fully aware that it would be interpreted to cover artificial entities as well as individuals.

It nevertheless does not follow that the "white persons" to whom will be shifted the burden of proof in title litigation with Indians also include the sovereign States of the Union. "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *United States v. Cooper Corp.*, 312 U. S. 600, 604 (1941); accord, *United States v. Mine Workers*, 330 U. S. 258, 275 (1947). Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage. *United States v. Knight*, 14 Pet. 301, 315 (1840). There is nevertheless "no hard and fast rule of exclusion," *United States v. Cooper, Corp., supra*, at 604-605; and much depends on the context, the subject matter, legislative history and executive interpretation. The legislative history here is uninformative, and executive interpretation is unhelpful with respect to this dormant statute. But in terms of the purpose of the provision—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the States so as to offset the likeli-

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[17]There were two corporate defendants among the parties in the District Court. They filed a separate petition for certiorari, No. 78-162, but no action has yet been taken on it. Under our rules, however, the two corporations are party-respondents in the cases which we have granted. Rule 21(4).

hood of unfair advantage. Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section." H. R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished. . . ." Although this definition was discarded in the Revised Statutes, see R. S. 5596, it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.

Nor have we discovered anything since its passage or in connection with the definition of Indian country now contained in the criminal code, 18 U. S. C. § 1151, indicating that Congress intended the word "white person" in § 194 to include any of the original or any of the newly admitted States of the Union. We hesitate, therefore, to hold that the State of Iowa must necessarily be disadvantaged by § 194 when litigating title to the property to which it claims ownership, particularly where its opposition is an organized Indian tribe litigating with the help of the United States of America. It may well be that a State, like other litigants and like the State of Iowa did in this case, will often bear the burden of proof on various issues in litigating the title to real estate. But § 194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that

the Tribe was once in possession of or had title to the area under dispute.

Petitioners also defend the refusal of the District Court to apply § 194 on the grounds that a precondition to applying it is proof of prior possession or title in the Indians and that this involves the merits of the issue on which this case turns—whether the changes in the river were avulsive or accretive. We think the Court of Appeals had the better view of the statute in this regard. Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute. The usual way of describing real property is by identifying an area on the surface of the earth through the use of natural or artificial monuments. There seems to be no question here that the area within the Barrett survey was once riparian land lying on the *west* bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854. This was enough, it seems to us, to bring § 194 into play. Of course, that would not foreclose the State of Iowa from offering sufficient evidence to prove its own title or from prevailing on any affirmative defenses it may have.

Petitioners also assert that even if § 194 is operative and even if the Tribe has made out its prima facie case, only the burden of going forward with the evidence, and not the burden of persuasion, is shifted to the State. Therefore they, the petitioners, should prevail if the evidence is in equipoise. The term "burden of proof" may well be an ambiguous term connoting either the burden of going forward with the evidence, the burden of persuasion or

both. But in view of the evident purpose of the statute and its use of the term "presumption" which the "white man" must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession.

## III.

### A.

In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), this Court held that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways. This was expressive of the general rule with respect to the incidents of federal land grants:

> " 'We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.' " *Id.*, at 377, quoting *Wilcox v. Jackson*, 13 Pet. 498, 517 (1839) (emphasis added by the *Corvallis* Court).

The Court's conclusion in the particular dispute before it in *Corvallis* was that state law governed the rights of the riparian owner because there was no claim of an applicable federal right other than the equal footing origin of the State's title.

As the Court of Appeals held, however, the general rule recognized by *Corvallis* does not oust federal law in this case. Here we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest. The area within the survey was part of land to which the Omahas had held aboriginal title and which was reserved by the Tribe and designated by the United States as a reservation and the Tribe's permanent home. The United States continues to hold the reservation lands in trust for the Tribe and to recognize the Tribe pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*

In these circumstances, where the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation v. County of Oneida,* 414 U. S., at 677. It is rudimentary that "Indian title is a matter of federal law and can be extinguished only with federal consent" and that the termination of the protection that federal law, treaties and statutes extend to Indian occupancy is "exclusively the province of federal law." *Id.,* at 670. Insofar as the applicable law is concerned, therefore, the claims of the Omahas are "clearly distinguishable from the claims of grantees for whom the Federal Government has taken no such responsibility." *Id.,* at 684 (REHNQUIST, J., concurring). This is not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantees'

incidents of ownership to determination by the applicable state law. The issue here is whether the Tribe is no longer entitled to possession of an area that in the past was concededly part of the reservation as originally established. That question, under *Oneida*, is a matter for the federal law to decide.[18]

B.

Although we have determined that federal law ultimately controls the issue in this case, it is still true that "[c]ontroversies . . . governed by federal law, do not inevitably require resort to uniform federal rules. . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature

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[18]Petitioners claim that *Oklahoma v. Texas*, 258 U. S. 574 (1922), mandates the applicability of state rather than federal law in this case. But there the United States issued patents granting former reservation lands. The Court merely held that, absent contrary evidence, when the United States conveyed and completely parted with its territory, even though Indian land, it intended the incidents of the resulting ownership to be determined by state law. This is no more than the general rule that *Oneida* recognized. In the present case, of course, the area at issue was never conveyed away by the United States or by the Tribe and is claimed by the United States and the Tribe to remain part of the reservation established as the result of the treaty of 1854. Neither do we find that *United States v. Oklahoma Gas and Electric Co.*, 318 U. S. 206 (1943), presents a contrary holding. There, the Court refused to construe a federal statute permitting the Secretary of the Interior to grant permission for the opening of highways over Indian land "in accordance with the laws of the state" as prohibiting the establishment of a power line in the highway right-of-way without further federal consent. As we understand that case, the Court held only that the consent authorized by the federal statute to include the uses to which such consent would authorize under state law.

of the specific governmental interests and to the effects upon them of applying state law.' " *United States v. Kimbell Foods, Inc.*, — U. S. — (1979) (slip op., at 11), quoting *United States v. Standard Oil Co.*, 332 U. S. 301, 310 (1947).[19] The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes between States having their common border on a navigable stream, purported to find in those doctrines the legal standards to apply in deciding whether the changes in the course of the Missouri River involved in this case had been avulsive or accretive in nature.

The federal law applied in boundary cases, however, does not necessarily furnish the appropriate rules to govern this case. No dispute between Iowa and Nebraska as to their common border on or near the Missouri River is involved here. The location of that border on the ground was settled by Compact in 1943 and by further litigation in this Court, *Nebraska v. Iowa*, 406 U. S. 117 (1972). The federal interest in this respect has thus been satisfied, except to the extent that the Compact itself may bear upon a dispute such as this. *United States v. Kimbell Foods, Inc., supra*, advises that at this juncture we should consider whether there is need for a nationally uniform body

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[19]Compare Hart and Wechsler, The Federal Courts and the Federal System 768 (2d ed. 1973):

"The federal 'command' to incorporate state law may be a judicial rather than a legislative command; that is, it may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should 'govern' a given question, state law furnishes an appropriate and convenient measure of the content of the federal law."

of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law. An application of these factors suggest to us that state law should be borrowed as the federal rule of decision here.

First, we perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian Tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal law. It is true that States may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions, but as long as the applicable standard is applied evenhandedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute. We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]." *United States v. Kimbell Foods, Inc., supra,* at — (slip op., at 13).

Furthermore, given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests. On some occasions, Indian Tribes may lose some land because of the application of a particular state rule of accretion and avulsion, but it is as likely on other occasions the Tribe will

stand to gain. The same would be the case under a federal rule, including the rule that the Court of Appeals announced in this case. The United States fears a hostile and unfavorable treatment at the hands of state law, but as we have said the legal issues are federal and the federal courts will have jurisdiction to hear them. *Oneida Indian National v. County of Oneida, supra.* Adequate means are thus available to insure fair treatment of tribal and federal interests.

This is also an area in which the States have substantial interest in having their own law resolve controversies such as these. Private landowners rely on state real property law when purchasing real property, whether riparian land or not. There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Borrowing state law will also avoid arriving at one answer to the avulsive-accretion riddle in disputes involving Indians on one side and possibly quite different answers with respect to neighboring land where non-Indians are the disputants. Indeed, in this case several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals.

We have borrowed state law in Indian cases before. In *Board of Commissioners v. United States,* 308 U. S. 343 (1939), the question was what law, federal or state, would apply in a claim to recover taxes improperly levied

by a political subdivision of a State upon Indians' trust lands. The Court observed that "[s]ince the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas. *Id.*, at 349-350. The Court, nevertheless, elected to adopt state law as the federal rule of decision. There was no reason in the circumstances of the case for the beneficiaries of federal rights to have a privileged position over other aggrieved taxpayers, and "[t]o respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate." [20]

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[20]See *Board of Commissioners v. United States*, 308 U. S. 343, 351-352 (1939):

"Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, see *Stone v. White*, 301 U. S. 532, 534, Congress has left us free to take into account appropriate considerations of 'public convenience.' Cf. *Virginian Ry. Co. v. Federation*, 300 U. S. 515, 552. Nothing seems to us more appropriate than due regard for local institutions and local interests. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected by their local laws. See, e. g., § 5 of the General Allotment Act of 1887, 24 Stat. 388, 389. With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See *Brown v. United States*, 263 U. S. 78; *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged

The importance of attending to state law, once an interstate boundary has been determined, is underlined by *Arkansas v. Tennessee,* 246 U. S. 158, 175-176 (1918). In that case, because the disputed boundary between Arkansas and Tennessee had been determined, the question of title to riparian land and to the river bottom was a matter to be determined by local law:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located."

Likewise, in the present case, the Compact of 1943 settled the location of the interstate boundary, within and without the river; and the question of land ownership within or adjacent to the river is best settled by reference to local law even where Indian trust land, a creature of the federal law, is involved.

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The passage quoted above from *Arkansas v. Tennessee* was quoted with approval in *Nebraska v. Iowa,* 406

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position over other aggrieved taxpayers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate."

U. S. 117 (1972), where the central question was the interpretation of the Interstate Compact determining the location of the entire border between Nebraska and Iowa.[21] Our opinion in *Nebraska v. Iowa* is also instructive with respect to which state law, Iowa or Nebraska, the federal court should refer to in determining the federal standard applicable to this case.

Under § 2 of the Compact, each State ceded to the other and relinquished jurisdiction over all lands within the Compact boundary of the other State. Under § 3, "Titles, mortgages, and other liens," affecting such lands that are "good in" the ceding State "shall be good in" the other State.[22] Thus, ceded lands east of the Compact line came under Iowa jurisdiction; but Iowa was obligated to respect title to any ceded land east of the new boundary if that title was "good in" Nebraska. Accepting the Special Master's recommendations in this respect, the Court ruled that one claiming a Nebraska title to land east of the Compact line need show only "good title" under Nebraska law and need not also prove either the

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[21]The Special Master in that case observed that, although it would be difficult, the location of the agreed-upon boundary in the Compact could be determined with reasonable accuracy. Report of Special Master in *Nebraska v. Iowa,* O. T. 1964, No. 17 Original, p. 50.

[22]See Act of July 12, 1943, ch. 220, 57 Stat. 494:

. . . . . .

"Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

"Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

location of the original boundary between the two States or that the land at issue was on the Nebraska side of that original boundary. The Court further ruled in agreement with the Special Master, that in litigating with private claimants seeking to prove good Nebraska title to land east of the Compact line, the State of Iowa was disentitled to rely on certain doctrines of Iowa common law bearing on riparian land ownership.[23]

In this case, the District Court ruled that even though the United States and an Indian tribe rather than private parties were plaintiffs, title to the Barrett survey land, which was once in Nebraska but is now unquestionably in Iowa, should be governed by Nebraska law in accordance with the terms of the Compact. Proceeding to adjudicate the case in accordance with Nebraska law, the District Judge found that the Tribe and the Government, respondents here, had failed to prove that the Blackbird Bend area had been separated from the rest of the reservation by avulsive changes in the Missouri River and that the defendants, petitioners here, without the aid of any presumption of accretion available under Iowa law if applicable, had instead proved that the river changes had been by accretion. In the course of arriving at this conclusion the District Court, relying on Nebraska cases, rejected the Government's definition of avulsion, later embraced by the Court of Appeals, as contrary to the com-

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[23]Under this ruling Iowa was disentitled, either as plaintiff or defendant, from invoking its presumption that changes in the Missouri has been accretive rather than avulsive, and could not rely on its rule that no person can claim adversely against the sovereign State of Iowa. Thus a title based on adverse possession good under Nebraska law would be good in Iowa. Report of Special Master, *supra*, at 174-175.

mon law of Nebraska. The defendants, petitioners here, having carried the burden of proving their good title to the land at issue, were entitled to a decree quieting title in them.

Although we have already held the District Court erred in concluding that determination of titles to reservations lands is not a matter for the federal law, we have also indicated that the federal law should incorporate the applicable state property law to resolve the dispute. Therefore, it seems to us that the District Court reached the correct result in ruling that under the construction of the Compact in *Nebraska v. Iowa,* Nebraska law should be applied in determining whether the changes in the river that moved the Blackbird Bend area from Nebraska to Iowa had been avulsive or accretive. It should also be noted that the District Court, although wrong in wholly rejecting the applicability of § 194, concluded as a matter of fact and law that the defendants, petitioners here, had carried the burden of persuasion normally incumbent upon a plaintiff to a quiet title action, and had proved by a preponderance of the evidence that the reservation lands had been eroded away and had accreted to the Iowa shoreline. Apparently for this reason, the trial judge observed at the end of his memorandum opinion that were he wrong in refusing to apply § 194, his findings and conclusions "would not be altered by any different allocation of the burden of persuasion." 433 F. Supp., at 67.

## IV

In sum, the Court of Appeals was partially correct in ruling that § 194 was applicable in this case. By its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. We also agree with the Court of Appeals' conclusion that federal law governed the substantive aspects of the dispute, but find it in error for arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion. Instead, the court should have incorporated the law of the State that otherwise would have been applicable which, as we have said, is the law of Nebraska. Of course, because of its view of the controlling law, the Court of Appeals did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case. These tasks are still to be performed, and we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

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Nos. 78-160 and 78-161

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Roy Tibbals Wilson et al.,
*Petitioners,*

78-160 vs.

Omaha Indian Tribe et al.

State of Iowa et al.,
*Petitioners,*

78-161 vs.

Omaha Indian Tribe et al.

On Writs of Certiorari to the
United States Court of Appeals
for the Eighth Circuit.

[June 20, 1979]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion, but I write briefly to add a comment about my views as to the scope of 25 U. S. C. § 194.

Section 194 applies to a property dispute between an Indian and a "white person." The property dispute here is between Indians, on the one hand, and, on the other, nine individuals, two corporations, and the State of Iowa. See 575 F. 2d 620, 622 (CA8 1978). The Court holds that "white person" includes an artificial entity and thus that

§ 194 applies in the dispute between the Omahas and the two corporate petitioners. *Ante,* at 10-11. Contrariwise, the Court holds that "white person" does not include a sovereign State, and thus that § 194 does not apply in the dispute between the Omahas and petitioner State of Iowa. *Ante,* at 11-12, 23. The Court, however, does not expressly discuss § 194's applicability to the nine individual claimants.

Since the Court nevertheless holds that "§ 194 applies to the private petitioners" without exception, *ante,* at 23, it must be proceeding on one of two assumptions. The Court could assume, first, that all nine individual petitioners are Caucasians, and hence each literally is a "white person" under § 194. There is no evidence in the record, however, as to the race of these individuals. See Brief for Petitioners in No. 78-160, p. 30; Brief for United States 32 n. 25; Tr. of Oral Arg. 13. Since the burden of proving the factual predicate for § 194's applicability presumably rests on the Indians who seek to invoke it, the Court, in holding § 194 applicable to the individual petitioners here, could not properly rely on this first possible assumption.

The Court could assume, second, that "white person" in § 194 refers, not to a Caucasian, but to a "non-Indian" individual. On this assumption, the race of the individual petitioners (so long as they are not Indians) would be irrelevant in determining § 194's applicability. That this is in fact the assumption the Court makes is suggested by its decision to ignore the adjective "white" in holding each of the corporate petitioners to be a "white person", and by its refusal to follow *United States v. Perryman,* 100 U. S. 235 (1880), where it was held that "white per-

son," as used in another section of the Non-Intercourse Act, did not include a Negro. *Ante,* at 10 n. 16.

The Court seems to hold implicitly, therefore, that "white person" in § 194 includes any "non-Indian" individual. I would prefer to make this holding explicit. In my view, any other construction of § 194 would raise serious constitutional questions. To construe § 194 as applicable to disputes between Indians and Caucasians, but not to disputes between Indians and black or oriental individuals, would create an irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee. To avoid this result, § 194's reference to a "white person" must be read to mean any "non-Indian" individual or entity, and I so interpret the Court's holding today. To the extent that Perryman is inconsistent with this reading, I must regard that case as overruled *sub silentio.*

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UNITED STATES COURT OF APPEALS

For the Eighth Circuit

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Nos. 77-1384, 77-1387

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No. 77-1384

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Omaha Indian Tribe, Treaty of 1854 with the United States (10 Stat. 1043), Organized pursuant to the Act of 6/18/34 (48 Stat. 984; 25 U. S. C. 476) as amended,

*Appellant,*

vs.

Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, The State of Iowa, Darrell L., Harold, Harold M. and Luea Sorenson, State Conservation Commission of the State of Iowa,

*Appellees.*

Appeal from the United States District Court
for the Northern District of Iowa.

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No. 77-1387

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United States of America,

*Appellant,*

vs.

Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company and the State of Iowa,

*Appellees.*

Appeal from the United States District Court
for the Northern District of Iowa.

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Submitted: June 13, 1977
Filed: January 15, 1980

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Before LAY, Chief Judge,* STEPHENSON and HENLEY, Circuit Judges.

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*Judge Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

LAY, Chief Judge.

These cases have been remanded to us by the United States Supreme Court for reconsideration in light of the principles set forth in its June 20, 1979 opinion. *Wilson v. Omaha Indian Tribe,* 99 S. Ct. 2529 (1979).

I. *Factual Background.*

At issue is ownership of approximately 2,900 acres of land lying adjacent to the Missouri River in an area called Blackbird Bend located in what was then the Territory of Nebraska, and which is conceded to have been set aside in 1854 by treaty as a reservation for the Omaha Indian Tribe. The tortured history of the land dispute and attendant controversy over the nature of the early movements of the Missouri River is fully set forth in the district court's opinion, 433 F. Supp. 67 (N. D. Iowa 1977), as well as in this court's previous decision, 575 F. 2d 620 (8th Cir. 1978). This court reversed the district court's judgment in favor of the defendants and against the Tribe. We did so for two reasons: (1) We held the district court failed to apply federal law rather than state law in regard to burden of proof, 25 U. S. C. § 194, and substantive law concerning accretion and avulsion; and (2) we found the proof of accretion adduced by defendants was conjectural and speculative and defendants failed to meet the requisite burden.

The Supreme Court granted certiorari, confining its review to the applicability of 25 U. S. C. § 194, and whether federal or state law should have been employed to determine the substantive issue of river movement.

Generally, the Court sustained our holding that 25 U. S. C. § 194 was applicable and placed both the burden

of going forward with the evidence and of persuasion upon the defendants.[1] The statute reads:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

The Court also agreed that the Tribe's right to the property depended upon federal law, "'wholly apart from the application of state law principles which normally and separately protect a valid right of possession,'" 99 S. Ct. at 2539 (quoting *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 677 (1974)). Nonetheless, the Court held the legal standard to be employed in determining whether accretion or avulsion occured, absent any boundary dispute or other need for a uniform federal rule, should be borrowed from applicable state property law, in this case the law of the State of Nebraska. 99 S. Ct. at 2543.

II. *Nebraska Law.*

On review of the governing principles of state law, we hold the district court's interpretation of Nebraska law was incorrect, and adhere to our prior opinion that all parties making claim against the Tribe, with the ex-

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1The Court held 25 U. S. C. § 194 did not apply to land claimed by the State of Iowa, because a sovereign could not be construed to be a "white person" within the meaning of the Statute. *Wilson v. Omaha Indian Tribe,* 99 S. Ct. 2529, 2537-38 (1977).

ception of the State of Iowa, demonstrated only speculative and conjectural evidence of their right to have title to the reservation land, which was granted to the Tribe by the Treaty of 1854, quieted in them. We hold that those parties failed to sustain the burden of proof placed upon them by 25 U. S. C. § 194 and title to the land in question should be quieted in the Tribe.[2]

Our disagreement with the district court was with its broad definition of accretion and correspondingly narrow definition of avulsion. We stated:

> The trial court . . . held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion.

575 F. 2d at 639.

We also held the district court erroneously placed the burden of proof on the Tribe, although it did not give defendants the benefit of a presumption of accretion. *Id.* at 633. The result was that defendants received the benefit of any favorable inferences from sketchy proof of

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[2]The Supreme Court stated we found the evidence was in "equipoise." 99 S. Ct. at 2535. We recognize the Court could have reasonably concluded we found the evidence evenly balanced from our statement that "defendants have failed in sustaining their burden of proof under § 194." Nevertheless, we did not intend to convey that assessment of the weight of the evidence. Nor do we here; rather, we adhere to our prior holding that defendants failed to meet their burden because their "case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved." *Omaha Indian Tribe v. Wilson*, 575 F. 2d 620, 650 (8th Cir. 1978).

avulsion: what was not clearly proved avulsive must, in the district court's view, be the result of accretion.

The Supreme Court's decision makes it clear that defendants shoulder the burden of persuasion on the question of whether the Tribe is no longer entitled to possession of the area which was in the past part of its reservation. To quiet title in themselves, defendants must show the strength of their title; they must prove by a preponderance of the evidence that the River changed by the process called accretion. Thus they do not have the advantage, as they did under the trial court's reasoning, of inferences drawn from weaknesses in evidence tending to show avulsion. *See Mitchell v. Beermann,* 175 Neb. 616, 620, 122 N. W. 2d 525, 527 (1963); *Jones v. Schmidt,* 170 Neb. 351, 355, 102 N. W. 2d 640, 644 (1960); *De Long v. Olsen,* 63 Neb. 327, 329, 88 N. W. 512, 513 (1901).

Upon examination of Nebraska case law, we conclude Nebraska adheres to the common law principles governing avulsion and accretion set forth in our earlier opinion.[3] Federal and Nebraska law do not differ substantial-

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[3]We note the district court, as well as the original briefs of each of the defendants, the Government and the Tribe expressed the opinion that Nebraska law governing accretion and avulsion was not substantially different from federal law. While we still disagree with the district court's failure to use federal law in allocating the burden of proof, it is now decided that governing substantive rules are not drawn from the federal common law. With the case in this changed posture, we agree with the district court's statement that, as to definitions of accretive and avulsive movement of the Missouri River, there is no significant difference between federal and Nebraska law relevant to this case. *United States v. Wilson,* 433 F. Supp. 57, 65 (N. D. Iowa 1977).

ly in the basic definition of the terms, perhaps because of the shared origin of the common law principles in Roman and early English law. Our prior analysis, commencing with early definitions from the Institutes of Justinian through the early United States Supreme Court cases including *Missouri v. Kentucky,* 78 U. S. (11 Wall.) 395 (1870); *Jefferis v. East Omaha Land Co.,* 134 U. S. 178 (1890); *Nebraska v. Iowa,* 143 U. S. 359 (1892), and this court's decisions in *Davis v. Anderson-Tully Co.,* 252 F. 681 (8th Cir. 1918); *Commissioners of Land Office v. United States,* 270 F. 110 (8th Cir. 1920), *appeal dismissed,* 260 U. S. 753 (1922), finds full accord in Nebraska case law. Nearly all the earlier Nebraska cases we have examined rely upon these and other early federal cases for definitions of accretion and avulsion.

The early United States Supreme Court cases of *Mayor, Aldermen & Inhabitants of New Orleans v. United States,* 35 U. S. (10 Pet.) 662 (1836) and *County of St. Clair v. Lovingston,* 90 U. S. (23 Wall.) 46 (1874), were cited as rules of decision and quoted in the early Nebraska case of *Gill v. Lydick,* 40 Neb. 508, 59 N. W. 104 (1894), and also in *Frank v. Smith,* 138 Neb. 382, 293 N. W. 329 (1940). As the Nebraska Supreme Court stated in *Lienmann v. Sarpy County,* 145 Neb. 382, 392, 16 N. W. 2d 725, 729 (1944), citing several representative cases, it "has repeatedly followed the rules of law as stated in State of Nebraska v. Iowa, supra." *See also, Mercurio v. Duncan,* 131 Neb. 767, 769, 269 N. W. 901, 902 (1936); *Independent Stock Farm v. Stevens,* 128 Neb. 619, 621, 259 N. W. 647, 648 (1935); *Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 610, 148 N. W. 328, 329 (1914); *De Long v. Olsen,* 63 Neb. at 331, 88 N. W. at 514. Prin-

ciples articulated by this court in *Commissioners of Land Office v. United States,* 270 F. 110 (8th Cir. 1920), *appeal dismissed,* 260 U. S. 753 (1922), were quoted with approval in *State v. Ecklund,* 147 Neb. 508, 521-22, 23 N. W. 2d 782, 789-90 (1946) and were applied in *Durfee v. Keiffer,* 168 Neb. 272, 280, 95 N. W. 2d 618, 624 (1959), and *Frank v. Smith,* 138 Neb. at 392, 293 N. W. at 334-35. An even earlier eighth circuit case, *Whiteside v. Norton,* 205 F. 5 (8th Cir. 1913), *appeal dismissed,* 239 U. S. 144 (1915), was also followed in *Durfee v. Keiffer.* As the district court stated: "Nebraska law has relied heavily on federal law in formulating its definitions of accretion and avulsion." *United States v. Wilson,* 433 F. Supp. at 65.

The case of *Nebraska v. Iowa,* 143 U. S. 359 (1892), which has had a seminal influence on the development of the legal definitions of accretion and avulsion in Nebraska case law, established that while the nature of the Missouri River might lead one to assume otherwise, the law of boundary changes due to diminution and accretion could apply to the River, at least "in the mere washing of the waters of the stream." *Id.* at 370. While erosion might take place rapidly on the banks of the Missouri, the boundary change rule would still apply as long as the land eroded so as to be completely disintegrated, *and* the accretion, despite the unusual rapidity of the erosion, was "a mere gradual and imperceptible process." *Id.* at 369; *see also, De Long v. Olsen,* 63 Neb. at 331, 88 N. W. at 514.

As Nebraska case law makes clear, this basic statement of accretive change in the Missouri River has two elements. First, a boundary changes only where the River's change of channel is caused by a process of ero-

sion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other—the land between the old and new channels must be completely disintegrated. This point is made most dramatically in *State v. Eklund,* a case in which title to old river bed land, bared by a river's gradual change in channel, was retained in accordance with the original boundary line, as is the case in avulsion. The river movement was not accretive, as the term is legally defined, because the river did not shift its channel by excavating or eroding intervening land, but by flowing around it. 147 Neb. at 523, 23 N. W. 2d at 789. Other cases, involving title to islands rather than old river bed land, also illustrate the principle. *E. g., Valder v. Wallis,* 196 Neb. 222, 242 N. W. 2d 112 (1976); *Durfee v. Keiffer.*

The second element, stressed by the court in *Nebraska v. Iowa,* is that no matter how "rapid and great" is "the abrasion and washing away," or "the diminution," of soil, the accretion (or reliction) of soil "is always gradual and by the imperceptible deposit of floating particles of earth." 143 U. S. at 368-69.[4] This point, the gradual and imperceptible nature of accretive change as stressed in *Nebraska v. Iowa,* is evident in Nebraska cases.[5] *See, e.*

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[4]Gradual and imperceptible does not mean change cannot be perceived, but only that the entire process, that is the accretion as well as the often rapid erosion, is not clearly perceptible as it is going on. *Gill v. Lydick,* 40 Neb. 508, 510-11, 59 N. W. 104, 105 (1894).

[5]Both elements are necessary. Gradual change without erosion of intervening land is not within the rule of accretive change, see *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782 (1946); nor is the washing away of soil sufficient, if the land is not gradually added, but suddenly formed. *See Wiggenhorn v. Kountz,* 23 Neb. 690, 37 N. W. 603 (1888). Statements

*g., Bouvier v. Stricklett,* 40 Neb. 792, 798-99, 59 N. W. 550, 553 (1894); *Gill v. Lydick,* 40 Neb. at 512, 59 N. W. at 105; *Mercurio v. Duncan,* 131 Neb. at 768-69, 269 N. W. at 903; *Jones v. Schmidt,* 170 Neb. at 356, 102 N. W. 2d at 644.

Clear distinctions become obscured when applied to the actual movement of uncontrolled rivers, as we noted in our prior opinion. Nevertheless, the elements of river channel change through the process of excavation or erosion and deposition or accretion must have been established for defendants to have met their burden of proof under Nebraska law. Not only is accretive change defined more precisely in Nebraska law than in the district court's opinion, but correspondingly, the Nebraska Supreme Court's definition of avulsion is similar to that set forth in our prior opinion as the federal standard, in that it is not as narrow as the district court's reasoning would indicate.[6] In contrast to the process of erosion and gradual

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echoing those of the Court in *Nebraska v. Iowa,* 143 U. S. 359 (1892) concerning the rapidity of change in the Missouri, *see, e. g., De Long v. Olsen,* 63 Neb. 327, 331, 88 N. W. 512, 514 (1901); *Kinkead v. Turgeon,* 74 Neb. 580, 586-89, 109 N. W. 744, 746-47 (1906), (vacating 74 Neb. 573, 104 N. W. 1061 (1905)); *see also* discussion in *United States v. Wilson,* 433 F. Supp. 57, 62-64 (N. D. Iowa 1977), refer to the rapid and sudden erosion and do not lessen the importance of the gradual and imperceptible requirement as it pertains to the second element of the movement process, accretion (or reliction) of soil. *See Nebraska v. Iowa,* 143 U. S. at 369.

[6]It should be noted that there is no presumption in Nebraska law that change in a river channel in general or in the Missouri is due to accretion. *See Jones v. Schmidt,* 170 Neb. 351, 102 N. W. 2d 640 (1960). In fact, even though the Supreme Court decided in *Nebraska v. Iowa,* 143 U. S. 359 (1892), that accretion could occur on the Missouri, the Nebraska Supreme Court noted that "[t]he Missouri River often changes its course by avulsion, . . . ." *Independent Stock Farm v. Stevens,* 128 Neb. 619, 621, 259 N. W. 647, 648 (1935).

deposition, avulsive movements of a river channel are characterized primarily by their suddenness and perceptibility.

The Nebraska cases indicate Nebraska follows the basic common law principle: avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood. A recent definition given by the Nebraska Supreme Court indicates the broad parameters of avulsive movement include movement within the river bed, and also illustrates the primary emphasis on sudden change:

> " 'Avulsion' is a sudden and perceptible loss or addition to land by the action of water, *or* a sudden change in the bed or course of a stream." 78 Am. Jur. 2d, Waters, s. 406, p. 852. See, also, *Ziemba v. Zeller,* 165 Neb. 419, 86 N. W. 2d 190; *Mercurio v. Duncan,* 131 Neb. 767, 269 N. W. 901. *Valder v. Wallis,* 196 Neb. 222, 224, 242 N. W. 2d 112, 114 (1976) (emphasis added).

Other cases stress the sudden character of avulsive change as its primary distinction from the process of erosion and gradual deposition. *See, e. g., Gill v. Lydick,* 40 Neb. at 512, 59 N. W. at 105 ("[B]ut, if the alteration takes place suddenly, the land thus formed does not belong to the proprietor of the adjoining soil."); *Wiggenhorn v. Kountz,* 23 Neb. at 694, 37 N. W. at 605 (quoting 3 Washburn R. P. 60 (4th ed.)). (" 'The difference between avulsion, . . . and alluvion, consists in the one being done by imperceptible loss from the land of one, and increment to that of the other; and in the other, its being done suddenly, to an extent which can be ascertained and

measured.'"); *Ingraham v. Hunt,* 159 Neb. 725, 732, 68 N. W. 2d 344, 348-49 (1955) ("a flood suddenly, violently, and visibly, by avulsion, changed its channel. . . . during the next few years, there were several flash floods which again suddenly, violently, and visibly by avulsion moved the channel. . . ."); *Jones v. Schmidt,* 170 Neb. at 356, 102 N. W. 2d at 644 (Some of the new structures [of land] came into being with suddenness, and others imperceptibly by addition over long periods of time to other structures. . . . the latter . . . is termed accretion.")[7]

Thus, in a channel shift the primary distinction in Nebraska law is between sudden and perceptible change and the process of erosion and gradual, imperceptible deposition. We adhere, therefore, to our earlier holding that the district court erred in including within the definition of accretive change a sudden movement without evidence of identifiable land in place.[8] Defendants' burden is not

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[7]While the district court correctly noted the Nebraska Supreme Court reversed an earlier finding of avulsion and held movement which occurred during a single high water period caused by an ice jam was accretive in *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943) (vacating 141 Neb. 517, 4 N. W. 2d 290 (1942)), the decision does not, we feel, represent a departure from the basic common law definitions. It may be better explained by the fact that no party pleaded avulsion, as none had title to the land in question if the old channel remained as the boundary. They sought title through adverse possession of accretive land. *Id.* at 8, 9, 8 N. W. 2d at 541. *Conkey II* does mention absence of identifiable land, but nevertheless gives the basic common law definition of avulsion: "Avulsion is the sudden and rapid change in the course and channel of a river." *Id.* at 10, 8 N. W. 2d at 541.

[8]Although we illustrated with specific federal cases, *Veatch v. White,* 23 F. 2d 69 (9th Cir. 1927); *Uhlhorn v. United States Gypsum Co.,* 366 F. 2d 211 (8th Cir. 1966), *cert. denied,* 385 U. S. 1026 (1967), we noted in other jurisdictions adopting

met by the absence of proof of identifiable land in place; of greater importance is the sufficiency of proof of erosion and gradual accretion. Because the unusually sudden and rapid erosion on the Missouri blurs the theoretical distinction between avulsion and accretion, the presence of identifiable land in place may have significant probative value in that it disproves one element of accretive change: erosion. *Omaha Indian Tribe v. Wilson,* 575 F. 2d at 637. The absence of identifiable land above high water cannot make defendants' case, however. Erosion must be shown; the mere fact that intervening land was once submerged does not yield the inference of river movement by accretion. For instance, in *State v. Ecklund,* the intervening land in a channel change was old river bed land. This fact alone did not justify application of the rule of accretion, however. The boundary remained the same, because the

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common law principles, identifiable land in place is a "significant" factor, but not the *sine qua non* to finding an avulsive shift of channel. We specifically cited Nebraska cases that referred to identifiable land in place when using Vattel's reference to avulsion in illustrating the "insensible" character of accretion, quoted in *Nebraska v. Iowa,* 143 U. S. 359, 366 (1892): "[W]hen the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner." We then noted the context was not a narrow definition of avulsion, but rather the Supreme Court's attempt to show accretion, as well as avulsion, could take place on the Missouri. *Omaha Indian Tribe v. Wilson,* 575 F. 2d 620, 635 n. 30 (8th Cir. 1978). Our analysis of federal case law and that of other jurisdictions, set forth in section V, concludes that other jurisdictions concur in the general definition of avulsion as sudden movement and the possibility of its occurrence within as well as without the bed of a stream. *Id.* at 637 n. 32, 33. We concluded: "Several state cases have similarly recognized that the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion. *Id.* at 637 (footnote omitted).

cause of the channel change was not gradual movement across the land by excavation and accretion, but diversion of the river's flow around a body of land. *Ecklund* relied upon an early opinion of this court concerning the situation where change, albeit gradual, is not due to erosion and subsequent accretion:

> To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.

147 Neb. at 522, 23 N. W. 2d at 789-90 (quoting *Commissioners of Land Office v. United States*, 270 F. at 113).[9]

Because both inundation and baring of land are part of the swift change process referred to as avulsion, *see* Beck, *The Wandering Missouri River: A Study in Accre-*

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[9]*Commissioners of Land Office v. United States*, 270 F. 110 (1920), *appeal dismissed*, 260 U. S. 753 (1922), relied upon *Davis v. Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918), which was quoted in our prior opinion. *Omaha Indian Tribe v. Wilson*, 575 F. 2d 620, 637 n. 34 (8th Cir. 1978).

*tion Law*, 43 N. D. L. Rev. 429, 431 (1967), intact land may well be temporarily under high water. As was noted by the district court, 433 F. Supp. at 65, when a bank is composed of point bar deposits, or sand and sediment, it may be difficult to detect land present prior to the swift inundation and baring of avulsive movement. Similarly, deposits of alluvion which increase a bank by accretion may follow avulsive changes. *See, e. g., Independent Stock Farm v. Stevens,* 128 Neb. at 622, 259 N. W. at 649. Therefore, evidence of relative variations in water elevation at different times and some changes in topographical conditions alone is not sufficient to prove accretion. *See e. g., Jones v. Schmidt,* 170 Neb. 351, 358, 102 N. W. 2d 640, 645 (1960).

We conclude both Nebraska and federal common law apply the same basic definitions of avulsion and accretion to boundary disputes caused by a river channel change. We hold the district court incorrectly interpreted the Nebraska cases to hold that all river movements, other than those in which intervening land above the high water mark is identifiably in place, are included within the term accretion. Thus, our review of the evidence in sections VI-VIII of our prior opinion compels the same holding: defendants' evidence supports only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods. Inferences drawn from the 1879 map, admittedly prepared at high water, are inconclusive; prior alluvion in that area means identifying features would be few; erosion on the surface of the point of land could have occurred as it was bared following swift inundation in the avulsive process. As we observed in our

earlier opinion, the evidence strongly suggests avulsive change in 1879 through a series of chute channels or a cut-off across the neck of the Blackbird Bend. As to the later time periods, the little scientific evidence there is in the record contradicts the defendants' theory.

III. *Application of Law to Facts.*

Even assuming the district court properly interpreted Nebraska law, nonetheless our review of the record demonstrates the district court findings are clearly erroneous. Even if it be assumed that identifiable land in place is the *sine qua non* of avulsive movement, the evidence of identifiable land in place or the lack thereof is simply too inconclusive, too dependent on speculation and conjecture, to support the inference of accretive change. Not only is defendants' evidence of a lack of identifiable land in place inconclusive, *Omaha Indian Tribe v. Wilson,* 575 F. 2d at 640-41, but there is evidence the land could be the same surface area described by Barrett. *Id.* at 641. Evidence supporting the possibility of avulsive chute channels or a neck cut-off does not equally balance defendants' proof, but rather points to the speculative and conjectural nature of *any* conclusions drawn from the evidence. Evidence of river movement in the critical periods too often gives no more than a basis for an "educated guess," in the words of defendants' expert witness, Dr. George R. Hallberg. Particularly in light of the requirement that defendants, because of the presumption applicable under 25 U. S. C. § 194, succeed on the strength of their own case and not any weakness in their opponents' claim to title, we conclude they failed to meet their burden of proof. As we

stated previously, "the ultimate conclusion may not rest on mere guesswork." *Omaha Indian Tribe v. Wilson,* 575 F. 2d at 650.

IV. *State of Iowa.*

We turn now to the reversal of this court's judgment that the State of Iowa was similarly bound by 25 U. S. C. § 194's allocation of the burden of proof. The record is not clear as to the time period and as to the specific land involved, in the Tribe's claim that land allegedly owned by the State was cut away from the reservation by avulsion. Under the circumstances, we feel the Tribe's case against the State should be separately remanded, and an opportunity given to sever the claim against the State and point out specific evidence relied upon to show avulsion on the particular land claimed by the State.[10] The district court shall review this evidence and make separate findings in regard to it.

The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment quieting title to the trust lands involved in this action, except those claimed by the State of Iowa, in the United States as trustee and the Omaha Indian Tribe; the prior orders relating to escrow funds and accounting procedures, with the exception of those funds relating to the land now claimed by the State of Iowa, governing the 2,900 acres within the original boundary of the Barrett Survey as originally ceded to the Tribe in the Treaty of 1854, are ordered dissolved. The judgment of the

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[10]We fail to understand the Tribe's argument that the State's case is defective because its title is based upon quitclaim deeds, but will allow the Tribe to restate the argument in district court.

district court is vacated as to the State of Iowa, and the cause remanded with directions that the Tribe's case against the State be severed and the Tribe given an opportunity to clarify its allegations against the State and the evidence it relies upon, so that the district court may separately review whether the Tribe has sustained its burden of proof against the State.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

September Term, 1979

Nos. 77-1384 and 77-1387.

77-1384.

Omaha Indian Tribe, etc.,
*Appellant,*

vs.

Roy Tibbals Wilson, et al,
*Appellees.*

77-1387.

United States of America,
*Appellant,*

vs.

Roy Tibbals Wilson, et al,
*Appellees.*

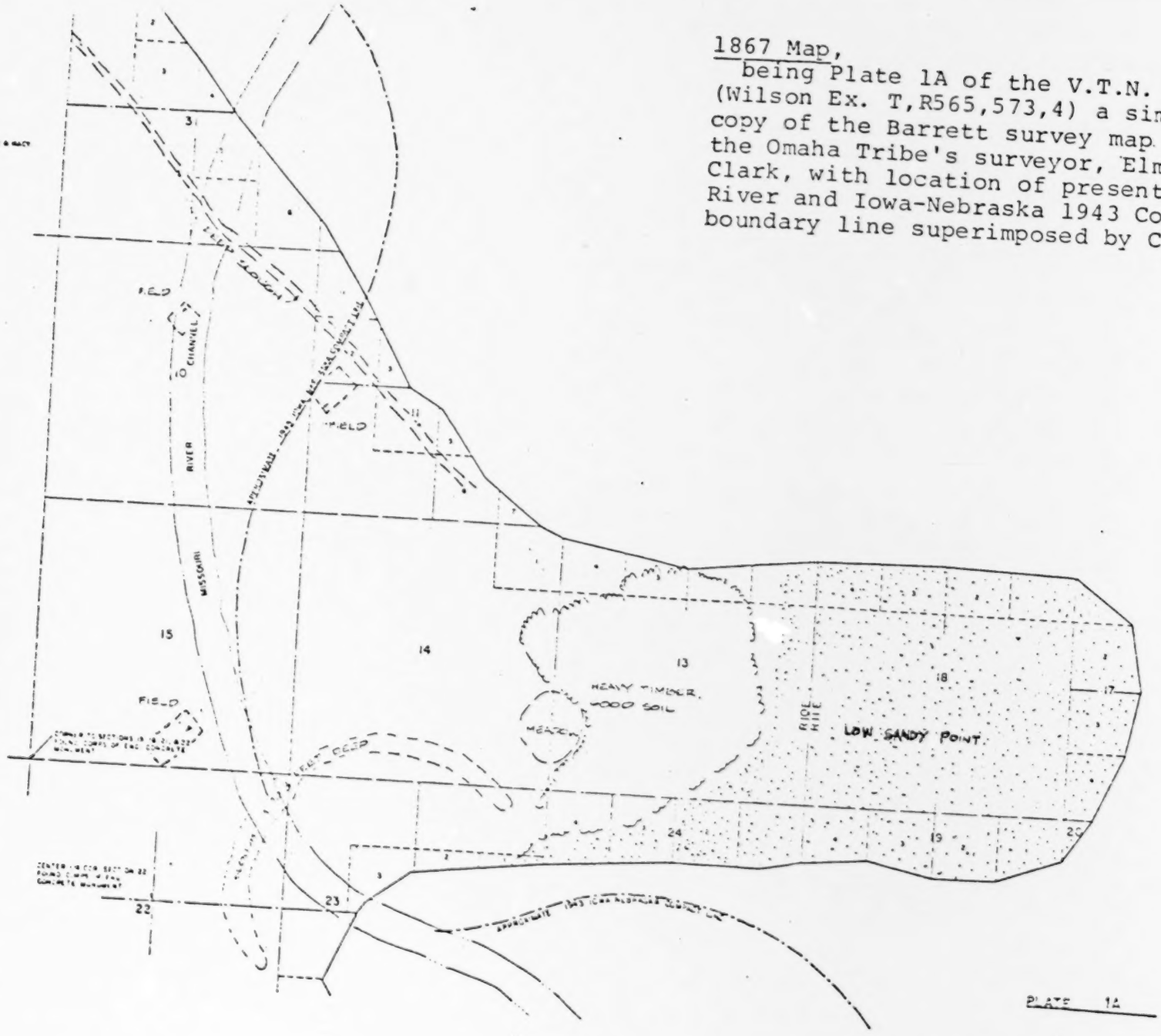
Appeals from the United States District Court
for the Northern District of Iowa.

The Court having considered all of the pending petitions for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that all of the pending petitions for rehearing en banc be and they are hereby, denied.

Considering the pending petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

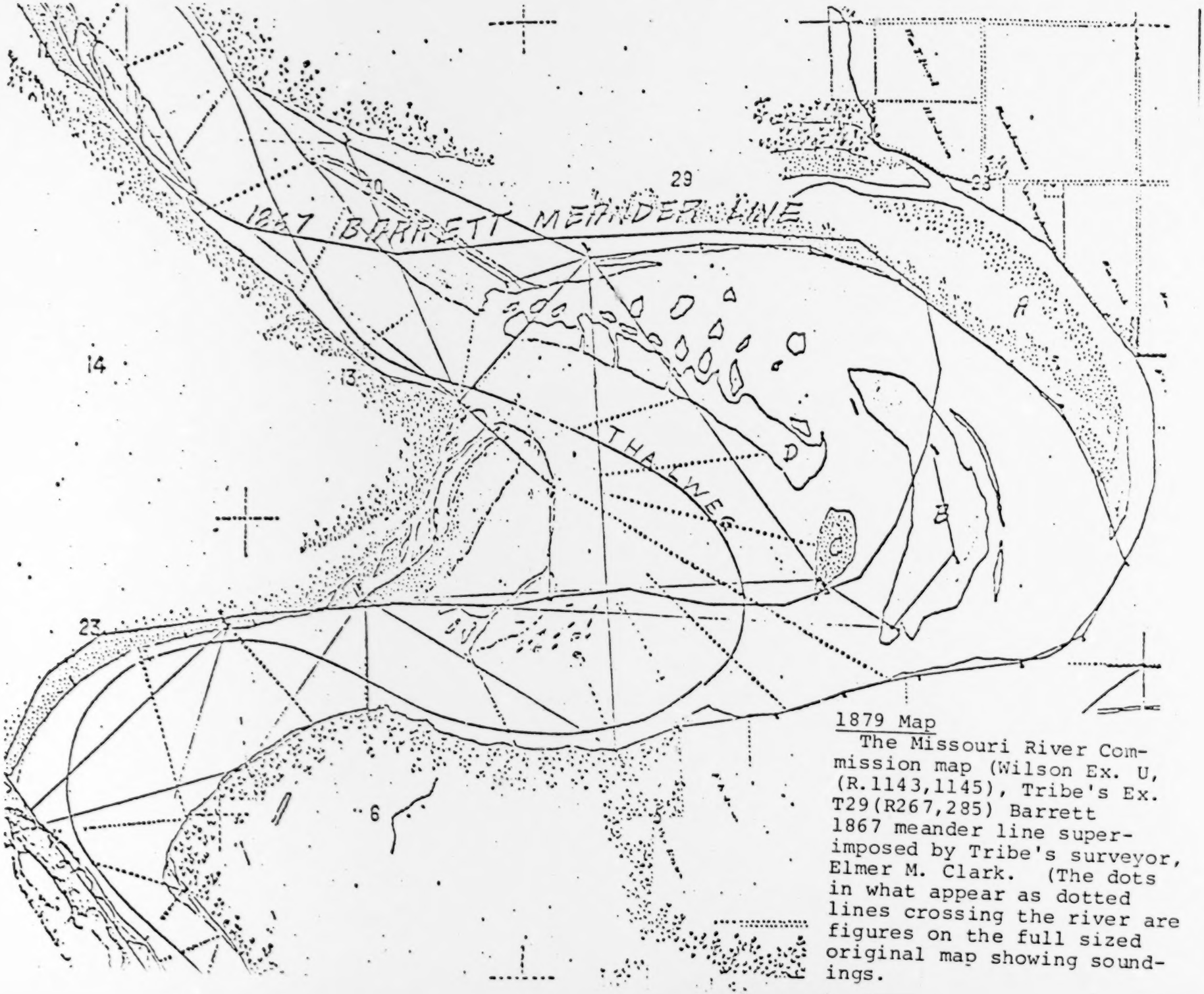
It is further ordered by this Court that appellees' motion for clarification of Court's judgment be, and it is hereby, overruled.

February 8, 1980



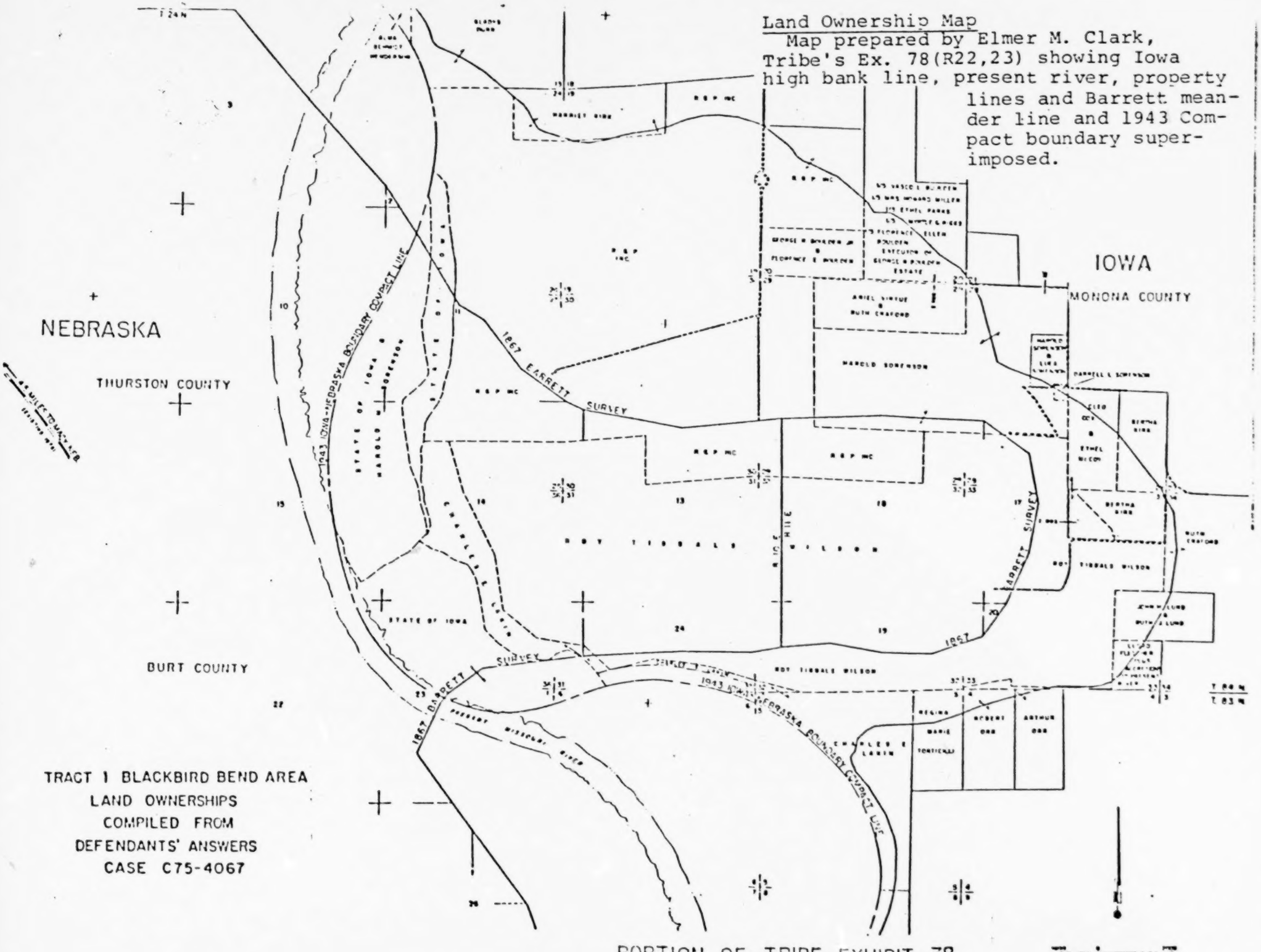

1867 Map,
being Plate 1A of the V.T.N. Report (Wilson Ex. T,R565,573,4) a simplified copy of the Barrett survey map made by the Omaha Tribe's surveyor, Elmer M. Clark, with location of present Missouri River and Iowa-Nebraska 1943 Compact boundary line superimposed by Clark.

1875 Map,
being part of a page of the Andreas Historical Atlas of 1875 (Wilson Ex. L3,R.1812,1813) with Barrett's west shore meander line of 1867 superimposed by defendants' surveyor, Jack V. Virtue.




1879 Map

The Missouri River Commission map (Wilson Ex. U, (R.1143,1145), Tribe's Ex. T29(R267,285) Barrett 1867 meander line superimposed by Tribe's surveyor, Elmer M. Clark. (The dots in what appear as dotted lines crossing the river are figures on the full sized original map showing soundings.




Land Ownership Map

Map prepared by Elmer M. Clark, Tribe's Ex. 78(R22,23) showing Iowa high bank line, present river, property lines and Barrett meander line and 1943 Compact boundary superimposed.

TRACT 1 BLACKBIRD BEND AREA
LAND OWNERSHIPS
COMPILED FROM
DEFENDANTS' ANSWERS
CASE C75-4067

PORTION OF TRIBE EXHIBIT 78

Supreme Court, U.S.
FILED
MAY 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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**No. 79-1741**

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON,

*Petitioners,*

**No. 79-1744**

RGP, INCORPORATED, OTIS PETERSON, and TRAVELERS INSURANCE COMPANY,

*Petitioners,*

**No. 79-1779**

STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Petitioners,*

---

GORDON DAHL and 81 OTHER FARM OWNERS IN MONTANA COUNTY AS AMICI CURIAE

---

THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF FOR THE OMAHA INDIAN TRIBE IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1741

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON,

*Petitioners,*

No. 79-1744

RGP, INCORPORATED, OTIS PETERSON, and TRAVELERS INSURANCE COMPANY,

*Petitioners,*

No. 79-1779

STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Petitioners,*

---

GORDON DAHL and 81 OTHER FARM OWNERS IN MONTANA COUNTY AS AMICI CURIAE

---

THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,

*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF FOR THE OMAHA INDIAN TRIBE IN OPPOSITION

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## OPINIONS BELOW

The Court decided *Wilson, et al.* v. *Omaha Indian Tribe* [No. 78-160, No. 78-161 on June 20, 1979, 442 U.S. 653 (1979)], and remanded the case to the United States Court of Appeals for the Eighth Circuit on a limited issue.

The Court of Appeals, on remand, rendered its Opinion on January 15, 1980, *Omaha Indian Tribe* v. *Wilson, et al.*, 614 F.2d 1153 (CA 8, 1980).

On April 11, 1978, the Court of Appeals rendered its earlier Opinion, *Omaha Indian Tribe* v. *Wilson, et al.*, 575 F.2d 620 (CA 8, 1978). By that Opinion, the United States Court of Appeals for the Eighth Circuit reversed the opinion, findings of fact and conclusions of law of the United States District Court for the Northern District of Iowa, Western Division, *United States* v. *Wilson, et al.*, 433 F.Supp. 57 (U.S.D.C. N.D. W.D. 1977).

References in this Brief in Opposition are made to:

1. *Wilson, et al.*, v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), and to *Omaha Indian Tribe* v. *Wilson, et al.*, 614 F.2d 1153 (CA 8, 1980), in Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, as App. at Pet., Wilson, *et al.*, No. 79-1741, and page number.
2. *Omaha Indian Tribe* v. *Wilson, et al.*, 575 F.2d 620 (CA 8, 1978), in Appendix to Petition for a Writ of Certiorari, to the United States Court of Appeals for the Eighth Circuit, as App. to Pet., Wilson, *et al.*, *No. 78-160*, and the page number.
3. Appendix on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, No. *78-160*, Wilson, *et al.*; No. *78-161*, Iowa, *et al.*, as App. on Writ of Certiorari, No. *78-160*, Wilson, *et al.*, No. *78-161*, Iowa, *et al.*, and the page number.

## JURISDICTION

The Opinion of the United States Court of Appeals for the Eighth Circuit was rendered January 15, 1980. Petitions for Rehearing and Petitions *en banc* were denied February 8, 1980. Timely Petitions for Writs of Certiorari were filed. The Court's jurisdiction has been invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court's Opinion of June 20, 1979, *Wilson, et al.* v. *Omaha Indian Tribe*, remanding a single limited issue to the Court of Appeals, was modified by the Court's subsequent Order of June 25, 1979, granting to Petitioners RGP, Inc., *et al.*, No. 79-1744, a writ of certiorari, requiring, as contended for by the Petitioners, that the Court of Appeals review and pass upon the constitutionality of 25 U.S.C. 194, in addition to the limited issue remanded to the Court by its Opinion of June 20, 1979.

2. Whether the Opinion of the Court of Appeals was in conformity with the mandate of the Court when it limited its Opinion to a consideration of ". . . whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case" or, additionally, should the Court of Appeals have considered the issue of the constitutionality of 25 U.S.C. 194 [App. to Pet., Wilson, *et al.*, No. 79-1741, p. 28; Wilson v. Omaha, 442 U.S. 653, 679 (1979)].

3. Whether the Court and the Court of Appeals have construed 25 U.S.C. 194 in a manner which creates an unconstitutionally irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution.

4. Whether the construction by the Court of Appeals of 25 U.S.C. 194 creates a burden of proof greater than a preponderance of the evidence, thus depriving the Petitioners of their property without due process.

5. Whether 25 U.S.C. 194 is "on its face" unconstitutional.

6. Whether the Court of Appeals erred in declaring "clearly erroneous" crucial findings of fact of the District Court by reason of the evidence offered in support of those findings being purely speculative and conjectural, as urged by the Petitioners.

7. Whether the Court of Appeals correctly interpreted the laws of Nebraska and applied those laws of Nebraska to the facts of the case in accordance with the mandate of the Court to the Court of Appeals.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

25 U.S.C. 194, Section 22 of the Indian Non-intercourse Act of 1834, is as follows:

> "§ 194. Trial of right of property; burden of proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

## STATEMENT OF FACT

### INTRODUCTION

For the second time, Petitioners Wilson, *et al.*,[1] RGP, Inc., *et al.*,[2] and the State of Iowa[3] seek to have the Court review questions stemming from disputes that have arisen between the Omaha Indian Tribe and the Petitioners over 2900 acres of land, referred to as the Blackbird Bend Area, situated in the State of Iowa. That controversy gave rise to the Court's Opinion of June 20, 1979, *Wilson* v. *Omaha Indian Tribe.*[4]

Petitioners Wilson, *et al.*, again request the Court to void as unconstitutional the congressional enactment 25 U.S.C. 194.[5] That section reads as follows:

> "§ 194. Trial of right of property; burden of proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white

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[1] No. 79-1741, Wilson, *et al.*, Petitioners v. Omaha Indian Tribe, Respondents.

[2] No. 79-1744, RGP, Inc., *et al.*, Petitioners v. Omaha Indian Tribe, Respondents.

[3] No. 79-1779, State of Iowa, *et al.*, Petitioners v. Omaha Indian Tribe, Respondents.

[4] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 2, *et seq.*, Wilson v. Omaha Indian Tribe, *et al.*, 442 U.S. 653, *et seq.* (1979).

[5] Pet. Wilson, *et al.*, No. 79-1741, pp. 4-5, para. 4: "Whether Title 25 U.S. Code § 194, putting the burden of proof on 'the white person' in a suit by 'an Indian', is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian tribes against all other races and deprives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment."

> person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Petitioners RGP, Inc., *et al.*, do not now assert the unconstitutionality of 25 U.S.C. 194 on its face. Rather, they assert that the Court and the Court of Appeals have construed 25 U.S.C. 194 in a manner which (a) deprives Petitioners of their property without due process of law; (b) creates ". . . an irrational racial classification . . ." which violates the Fifth Amendment; and (c) asserts that the Court of Appeals erred in its construction of 25 U.S.C. 194 ". . . by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process. . . ." [6]

Additionally, Petitioners RGP, Inc., *et al.*, are sharply critical of the Court of Appeals for allegedly having failed to consider the constitutionality of 25 U.S.C. 194. The circumstances giving rise to that contention follow.

### A. The Court's June 20, 1979 Opinion—Its Remand

On June 20, 1979, the Court entered its decision in *Wilson* v. *Omaha.*[7]

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[6] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 3, "Question Presented For Review":

> "Whether the Eighth Circuit Court of Appeals erred in its construction of 25 U.S.C. § 194 by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process; whether 25 U.S.C. § 194 as construed by the United States Supreme Court and the Eighth Circuit Court of Appeals unconstitutionally creates an irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution."

[7] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 2, *et seq.*, Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).

In detail, the Court construed and applied the provisions of 25 U.S.C. 194 as it related to the controversy between the Omaha Indian Tribe and the Petitioners over the 2900 acres constituting the Blackbird Bend Area.[8]

Having construed and applied 25 U.S.C. 194, the Court declared that federal law is controlling in regard to the issues before it and borrowed the law of the State of Nebraska as it related to those issues.[9]

Because the Court of Appeals ". . . did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case," the Court entered this mandate:

> ". . . we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion." [10]

The Court of Appeals acted in strict conformity with the mandate from the Court rendering its opinion after an exhaustive analysis of the Nebraska law respecting accretions and avulsions as they relate to the issues reviewed in *Wilson* v. *Omaha Indian Tribe.*[11]

**B. Petitioners RGP, Inc., *et al.*, Contend That The Court's June 20, 1979 Opinion Was Modified By The Subsequent Order Entered June 25, 1979, Granting Those Petitioners A Writ Of Certiorari**

Petitioners RGP, Inc., *et al.*, contend that the Court's Order in No. *78-162*, entered June 25, 1979, granting

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[8] *Ibid.*, at p. 10; 442 U.S. 653, 663, *et seq.* (1979).

[9] *Ibid.*, at pp. 17, *et seq.*, III.A.B.C.; 442 U.S. 653, 669, *et seq.* (1979).

[10] *Ibid.*, at p. 28, IV; 442 U.S. 653, 678-79 (1979).

[11] App. Pet., Wilson, *et al.*, No. 79-1741, p. 31; Omaha Indian Tribe v. Wilson, *et al.*, 614 F.2d 1153, *et seq.* (CA 8, 1980).

their petition for a writ of certiorari, resulted in a modification of the remand to the Court of Appeals, which was contained in this Court's Opinion in *Wilson* v. *Omaha*.[12] That modification, asserts RGP, Inc., *et al.*, required the Court of Appeals to render its opinion as to the constitutionality of 25 U.S.C. 194 predicated upon this question presented to the Court by those Petitioners in No. *78-162*:

> "Whether 25 U.S.C. § 194 is unconstitutional on its face and as construed and applied by the United States Court of Appeals for the Eighth Circuit because it constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment to the Constitution." [13]

The Court of Appeals' Opinion is strictly limited to ". . . the law of the State of Nebraska" respecting accretions and avulsions.[14]

Petitioners RGP, Inc., *et al.*, in their present Petition, complain:

> "The . . . Court of Appeals in its opinion filed January 15, 1980 gave *no* consideration to the question of the constitutionality of 25 U.S.C. § 194. . . ." [15]

Those Petitioners then add this statement:

> ". . . even though this Court has heretofore granted the Petition for Writ of Certiorari to these petitioners for the purpose of testing the constitutionality

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[12] *Ibid.*, at p. 28, IV; 442 U.S. 653, 678-79 (1979).

[13] Pet. RGP, Inc., *et al.*, No. *78-162*, "Question Presented For Review," p. 2.

[14] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 34; Omaha Indian Tribe v. Wilson, *et al.*, 614 F.2d 1153, 1155 (CA 8, 1980).

[15] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 4.

> of § 194, *the Court of Appeals has ignored that mandate and refused to consider the various serious constitutional problems presented by the statute as construed.*" [16]

Petitioner RGP, Inc., *et al.*, in their present Petition, No. 79-1744, present this question which is in two parts, which they desire the Court to review:

> "*Whether* the Eighth Circuit Court of Appeals erred in its construction of 25 U.S.C. § 194 by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process;
>
> *whether* 25 U.S.C. § 194 as construed by the United States Supreme Court and the Eighth Circuit Court of Appeals unconstitutionally creates an irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution." [17]

Raised by the questions quoted immediately above are issues directly relating to the Opinion of the Court in *Wilson* v. *Omaha Indian Tribe* and the Opinion of the Court of Appeals. Though the charge pertains to the alleged constitutionality of 25 U.S.C. 194, it necessarily involves the rationale of both Courts in construing and applying 25 U.S.C. 194. Throughout the two questions presented here by RGP, Inc., *et al.*, are (a) the issues of the constitutionality of 25 U.S.C. 194, which they seek to raise, with (b) the interpretation and application of the laws of the State of Nebraska respecting accretions and avulsions to the facts of these cases. Those issues are hereafter separately considered.[18]

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[16] *Ibid.*, at p. 5. [Emphasis supplied]

[17] *Ibid.*, "Question Presented For Review," p. 3. [Emphasis supplied]

[18] See, pp. 30, *et seq.*, *infra.*

It is denied, however, that the remand contained in the Court's Opinion of June 20, 1979, was enlarged and drastically modified by its June 25, 1979 Order granting the Petition of RGP, Inc., *et al.*, for a writ of certiorari. Rather, a plain reading of the Order reveals that the writ was granted in conformity with *Wilson, et al.* v. *Omaha Indian Tribe* and not in modification of it.[19]

### C. Petitioner State Of Iowa Has Unique Status Here—The Judgment Of The District Court Lacks Finality As To Iowa

The Court declared that 25 U.S.C. 194 does not apply to the State of Iowa.[20] Cognizance was taken of the fact that the Court of Appeals, in its Opinion, did not take into consideration whether the District Court had properly interpreted and applied the laws of the State of Nebraska respecting accretions and avulsions to the facts that were before it. Therefore, the Court declared, that the State of Iowa may offer ". . . evidence to prove its own title or from prevailing on any affirmative defenses it may have."[21] Adhering to that quoted concept, the Court, in its remand to the Court of Appeals, declared:

> ". . . because of its view of the controlling law, the Court of Appeals did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case."[22]

---

[19] "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Wilson* v. *Omaha Indian Tribe,* 442 U.S. —— (1979)."

[20] App. to Pet., Wilson, *et al.,* No. 79-1741, pp. 16, *et seq.*; Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669 (1979).

[21] *Ibid.*

[22] *Ibid.*, p. 28, IV; 442 U.S. 653, 679 (1979).

The Court then added:

> "These tasks are still to be performed, and we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion." [23]

In strict conformity with the express language of the Court's remand to it, the Court of Appeals "separately remanded" to the District Court the matter of the claims of the State of Iowa directing that "separate findings" are to be entered by the District Court in accordance with the mandate issued to it.[24]

It is respectfully suggested that both the Court and the Court of Appeals were cognizant of the fact that additional action by the District Court was requisite before there could be finality in the judgment relating to the State of Iowa. Petitioner Iowa very largely adopted the record in the trial court of the other Petitioners. At no time was the property of the State of Iowa separately considered by the District Court. There were no findings of fact, conclusions of law or judgment entered specifically in regard to the State of Iowa at the conclusion of the trial on the merits.[25] The outcome of the remand from the Court of Appeals to the District Court cannot at this time be determined. It is respectfully submitted, in the view of the Tribe, the State's Petition for Certiorari is premature. Until there has been entered a final judgment respecting the State of Iowa, that premature condition will continue to prevail.

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[23] *Ibid.*

[24] *Ibid.*, pp. 47-48; Omaha Indian Tribe v. Wilson, 614 F.2d 1153, 1161 (CA 8, 1980).

[25] App. to Pet., Wilson, *et al.*, No. *78-160*; State of Iowa and State Conservation Commission of the State of Iowa No. *78-161*; App. B, p. 1, Findings of Fact and Conclusions of Law; App. C, Memorandum Opinion of District Court.

**D. Petitioners Request The Court To (a) Analyze The Record Of Oral And Documentary Evidence To Determine If The Court Of Appeals Erred In Declaring "clearly erroneous" Crucial Findings Of The District Court; (b) Analyze The Opinion Of The Court Of Appeals To Determine Whether It Erred In Its Interpretation And Application Of The Law Of Nebraska Respecting Accretions And Avulsions**

Petitioners Wilson, *et al.*, renewed their request to the Court as to whether the Court of Appeals erred in declaring crucial findings by the District Court as being "clearly erroneous." [26] The Court refrained from reviewing that issue. Rather, it reviewed these questions raised by Petitioners Wilson, *et al.*:

> "In No. 78-160, we granted certiorari on the following questions:
>
> " 'Whether the Eighth Circuit erroneously construed Title 25 U.S. Code § 194 to make it applicable in this case.
>
> " 'Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.' " [27]

It is suggested that to review the "clearly erroneous" issue, as requested by Petitioners Wilson, *et al.*, at this time, would be a task of the first magnitude. The decision of *Wilson* v. *Omaha* has already determined that the Court of Appeals had correctly construed and applied 25 U.S.C. 194 as it relates to the burden of proof of Petitioners Wilson, *et al.*, and RGP, Inc., *et al.* An analysis of all of the oral and documentary evidence from the trial court would be an unnecessary burden in

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[26] Pet. Wilson, *et al.*, No. *78-160*, p. 5, para. 5.

[27] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 10, note 13; Wilson v. Omaha, 442 U.S. 653, 663-64 (1979).

light of the extended review of that evidence by the Court of Appeals in its original opinion.[28]

### E. The Court Is Requested By Petitioners To Review The Nebraska Law And To Apply It To The Facts Of These Cases

Petitioners complain at length that the Court of Appeals has failed correctly to apply the law of the State of Nebraska. Under the heading "Law of Accretion and Avulsion," the Court of Appeals analyzes the subject not only in regard to the federal law and the law of Iowa, but likewise as to the law of Nebraska.[29] With infinite care, the Court of Appeals, in its earlier decision, considered in great detail the oral and documentary evidence comprising the record in the District Court in the trial on the merits. Each of the separate time periods was carefully analyzed and the evidence respecting the movements of the Missouri River was explicitly deter-

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[28] Omaha v. Wilson, 575 F.2d 620, 639, "VI. The 1875-1879 Movement of the Thalweg"; p. 646—"VII. The River Between 1879 and 1912"; p. 647—"VIII. The 1912-1923 Movement of the Thalweg" (CA 8, 1978).

See, also, the Court of Appeals' analysis of "Factual Background," App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 33, *et seq.*

It is respectfully submitted that the appellate court has made a complete and exhaustive review not only of the applicable law, but has applied that law with infinite care to the facts taken by it from both the oral and documentary evidence comprising the record in the trial on the merits in the District Court.

[29] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A25, "V. Law of Accretion and Avulsion." See, in particular, pp. A30-A31, *et seq.*; Omaha v. Wilson, 575 F.2d 620, 633, 635 (CA 8, 1978).

mined predicated upon the record in the case.[30] A more thorough analysis of the trial court's record, than that which was made by the Court of Appeals in its first opinion, is difficult to perceive. It most assuredly demonstrates the lack of merit to the challenge by Petitioners that the Court of Appeals erred when it declared the District Court's findings "clearly erroneous."

In accordance with the Court's mandate, the Court of Appeals again analyzed in depth the trial court's record to the end that it could correctly determine whether, to use the words of the Court,

> ". . . the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case." [31]

In holding that the District Court's interpretation of Nebraska law was incorrect, the Court of Appeals undertook a most comprehensive and complete analysis of all the pertinent cases, including those of the Court and those of the Supreme Court of the State of Nebraska. To be observed is this fact: The analysis of the Court of Appeals and the cases it considered were far more comprehensive than the decisions of the Supreme Court of the State of Nebraska relied upon by the Petitioners in their effort to have the Court again review the issues pertaining to the 2900 acres which comprise the Blackbird Bend Area.

On that background, the facts, as they relate to the decision of the Court of Appeals, will be reviewed.

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[30] Omaha v. Wilson, 575 F.2d 620, at 639—"VI. The 1875-1879 Movement of the Thalweg"; P. 646—"VII. The River Between 1879 and 1912"; p. 647—"VIII. The 1912-1923 Movement of the Thalweg" (CA 8, 1978).

[31] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 28, IV; Wilson v. Omaha, 442 U.S. 653, 679 (1979).

## SUMMARY OF ARGUMENT

1. For the second time, the Petitioners return to the Court to have reviewed the decisions of the Court of Appeals for the Eighth Circuit. Both of the Opinions of the Court of Appeals contain in-depth reviews of both the facts and the law that pertain to these cases. (Statement of Fact, pp. 5, *et seq.*)

2. The subject matter or res of these proceedings is the title to 2900 acres of land, referred to as the Blackbird Bend Area situated in the State of Iowa, claimed by the Omaha Indian Tribe as part of its reservation created by the Treaty of 1854 with the United States relative to those lands.

a. The trial court, by its June 5, 1975 Order, maintained the Omaha Indians in possession of the lands in question stating, among other things, that the members of the Tribe have never totally acquiesced in the use of the 2900 acres by the defendants—Petitioners here. The trial court then added:

> ". . . the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years." (Pp. 45-46)

b. The trial court, in its June 5, 1975 Order, likewise ruled:

> ". . . the court views the present occupation by the Omaha Tribe. . . constitutes the status quo to be preserved." (p. 46).

3. The Court, in its June 20, 1979 decision—*Wilson* v. *Omaha*—stated that 25 U.S.C. 194 was enacted by Congress ". . . to protect Indians from claims made by non-Indian squatters on their lands." (p. 45)

4. Petitioners are "squatters" within the purview of 25 U.S.C. 194. Their claims are devoid of patents to the

lands or other indicia of title. Petitioners are trespassers on the 2900 acres, title to which is here involved. (pp. 45, *et seq.*)

5. The Court, in its June 20, 1979 Opinion, specifically ruled respecting the proof by the Omaha Indian Tribe that it had "previous possession" and "ownership" to the 2900 acres comprising the Blackbird Bend Area: "This was enough, it seems to us, to bring § 194 into play." (p. 21) The Court had stated:

> "Section 194 is triggered once the Tribe makes out a prima facie case. . . ." (p. 22).

6. The Omaha Indian Tribe, having "triggered," brought into play, § 194—in the words of the Court—Petitioners, without indicia of title, assumed the burden of proving—the impossible—that the 2900 acres were (a) totally obliterated and washed away by the Missouri River and (b) totally replaced by accretions to the Iowa bank. (p. 20)

7. Both the Court and the Court of Appeals, the Tribe having made out its prima case, required the Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*,

> ". . . to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question." (p. 21)

8. Repeatedly, the Court of Appeals declared that the Petitioners offered nonevidentiary, conjectural and speculative testimony and failed to sustain their burden of proving that (a) the 2900 acres, claimed by the Omaha Indian Tribe, were washed away and obliterated by the Missouri River and (b) the 2900 acres were totally and completely replaced by accretions to the Iowa bank. (p. 23)

9. Predicated upon that failure of the Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*, to sustain their burden of proof, the Court of Appeals declared that: ". . . title

to the land in question should be quieted in the Tribe." (pp. 22, *et seq.*)

10. The Court of Appeals, having declared that the Petitioners had failed to sustain their burden of proving that the Tribe had lost its title to the 2900 acres, was criticized by Petitioners in their Petitions alleging that the Court of Appeals failed properly to interpret and apply the laws of Nebraska to these cases, as mandated by the Court. (pp. 29, *et seq.*)

11. Petitioners failed to sustain their burden of proof respecting the crucial elements of accretion as prescribed by the laws of the State of Nebraska: Petitioners failed to prove (a) erosion of one bank of the Missouri River and (b) the replacement of that eroded bank by deposition to the opposite bank of silt and sediment. Petitioners offered testimony on both points, which was rejected by the Court of Appeals because it was conjectural, speculative and comprised of "educated guesses" (pp. 30, *et seq.*)

12. The Court of Appeals correctly declared that identifiable land in place is not an immutable criterion for establishing avlusion under the laws of Nebraska. Rather, the Court of Appeals emphasized the failure of the Petitioners to prove that the lands were eroded away and replaced by accretions to the Iowa bank. (pp. 34-35 & 36 *et seq.*).

13. Failure by Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*, to sustain their burdens of proof and persuasion, resulted in the Court of Appeals correctly directing that judgment be entered for the Tribe. (p. 22) The case of Petitioners State of Iowa, *et al.*, has been remanded to the District Court for further action and there has been no final action taken by the District Court. (pp. 41, *et seq.*)

14. All of the Petitions for Writs of Certiorari, it is respectfully submitted, should be denied.

## ARGUMENT

**25 U.S.C. 194, THE COURT HAS DECLARED, IS ". . . to protect Indians from claims made by non-Indian-squatters." [32]**

The quotation in the heading from the Court's Opinion in *Wilson* v. *Omaha* is most apropos here. Petitioners are indeed "squatters" on Omaha Indian Reservation lands.

Petitioners, being bereft of patents or other ordinary indicia of title, assert their claims to the land in a most unique manner. Answering the complaint of the Omaha Indian Tribe to quiet its title in and to the 2900 acres in question, Petitioners relied upon affirmative defenses in support of their counterclaim. As the Court states, "Both sides seek to quiet title in their names." [33]

Facts alleged by Petitioners in their affirmative defenses bring these cases within the explicit language of 25 U.S.C. 194. That congressional enactment, among other things, provides that:

> ". . . the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of [a] previous possession or [b] ownership."

As part of the endeavor to make out a claim against the Tribe for the lands in question, Petitioners admit that the Omaha Indian Tribe had both previous possession and ownership.

Both Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*, admit that:

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[32] *Ibid.*, at p. 12; 442 U.S. 653, 665 (1979).

[33] *Ibid.*, at p. 6; 442 U.S. 653, 660 (1979).

(1) the 2900 acres comprising the Blackbird Bend Area "existed" in 1867;

(2) the 2900 acres were surveyed in April and May of that year by Barrett on behalf of the United States of America;

(3) the 2900 acres were part of the Omaha Indian Reservation; and

(4) the 2900 acres comprising the Blackbird Bend Area were situated in the State of Nebraska.[34]

Petitioners, as part of their affirmative defenses, likewise assert, in error, that, although the 2900 acres in question existed as part of the Omaha Indian Reservation at one time,

> "All of said land [Blackbird Bend 2900 acres] was erroded away by the action of the Missiour River . . . and ceased to exist at the described location, having been washed down the river." [35]

Additionally, Petitioners asserted in error but could not prove this second aspect of their affirmative defenses:

> "New land was created between the years 1867 and 1943 and by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described [as the 2900 acres, title to which is the subject matter of these proceedings]. . . ." [36]

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[34] App. on Writ of Certiorari, Wilson, *et al.*, *78-160*, p. 157, para. 7; p. 158, para. 8.

[35] *Ibid.*

[36] *Ibid.*, Petitioners RGP, Inc., *et al.*, No. *78-162*, at pp. 165-66, paras. 7 & 8, interpose substantially the same affirmative defenses to the Complaint of the Tribe as those set forth in

The Petitioners' complaint that 25 U.S.C. 194 places upon them an onerous burden of proof should, it is respectfully submitted, be read in the light of the burden of proof that the Petitioners, perforce, had to assume by reason of their status as "squatters." The Petitioners had no other predicate for claiming title to the lands. Petitioners were forced to assert unsuccessfully—contrary to fact—that the 2900 acres in question constituting Blackbird Bend had been (a) totally obliterated and washed away by the Missouri River and (b) totally replaced by accretions to the Iowa bank. The burden thus assumed by the Petitioners, a burden that they could not sustain, is truly "mind boggling."

*Tribe Proved Its Prima Facie Case—It "triggered" 25 U.S.C. 194*

Unchallenged by the Petitioners is this unequivocal and undeniable statement by the Court of Appeals:

> "It is undisputed that the 1854 treaty established the Tribe as the legal title holder to the land area, within the Barrett Survey lines. This historical fact shows 'previous possession or ownership' [25 U.S.C. 194] and is sufficient to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants." [37]

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the preceding quotations taken from the Answer and Counterclaim of the Petitioners Wilson, *et al.*, No. *78-160*.

Petitioners State of Iowa, *et al.*, No. *78-161*, p. 154, para. 42, assert, in error, as do the other Petitioners, that: "Land which may at one time have been within the geographical area of the Omaha Indian Reservation or in the past occupied by the Omaha Indians, which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff to said land was extinguished thereby."

[37] App. to Pet., Wilson, *et al.*, No. *78-160*, pp. A21-A22; Omaha v. Wilson, 575 F.2d 620, 631 (CA 8, 1978).

Continuing in regard to the burden of proof of the Petitioners, the Court of Appeals added this crucial statement:

> "Title to the Blackbird Bend area as depicted by the Barrett Survey was presumptively shown to be in the Tribe. . . ." [38]

Therefore, said the Court of Appeals, notwithstanding the subsequent movement of the thalweg of the Missouri River,

> ". . . *the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question.*" [39]

In affirming the Opinion of the Court of Appeals respecting the application and interpretation of 25 U.S.C. 194, the Court said this in its June 20, 1979 Opinion in *Wilson* v. *Omaha*:

> "There seems to be no question here that the area within the Barrett survey was once riparian land lying on the *west* bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854." [40]

The Court then emphasized:

> "This was enough, it seems to us, to bring § 194 into play." [41]

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[38] *Ibid.*, at p. A25; 575 F.2d 620, 633 (CA 8, 1978).

[39] *Ibid.* [Emphasis added].

[40] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[41] *Ibid.*

Those statements comport fully with the earlier conclusion by the Court that:

> "Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute." [42]

The Court of Appeals, having thus been affirmed by the Court, proceeded to analyze the laws of Nebraska following this initial comment:

> "Generally, the Court sustained our holding that 25 U.S.C. § 194 was applicable and placed both the burden of going forward with the evidence and of persuasion upon the defendants." [43]

Continuing, the Court of Appeals, in its most recent decision, said:

> "We hold that those parties [Petitioners Wilson and RGP, Inc.] failed to sustain the burden of proof placed upon them by 25 U.S.C. § 194 and title to the land in question should be quieted in the Tribe." [44]

There has been a complete failure by Petitioners Wilson, *et al.*, RGP, Inc., *et al.*, and State of Iowa, *et al.*, to take cognizance of the precise and clear rulings by both the Court and the Court of Appeals. Succinctly stated, both Courts have declared that there resided with the Petitioners the burden of proving that the Tribe had, in some manner, lost its "possession and ownership," which all parties concede the Tribe had previously held. Let it be respectfully emphasized that none of the Petitioners undertook to challenge the explicit rulings of both the Courts that the Tribe had established its prima facie case

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[42] *Ibid.*

[43] *Ibid.*, pp. 33-34; Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[44] *Ibid.*, p. 35; 614 F.2d 1153, 1155-56 (CA 8, 1980).

and, in so doing, had moved the burdens of proof and of persuasion to the Petitioners, who failed to sustain their burdens under 25 U.S.C. 194.

**FAILURE OF PETITIONERS CORRECTLY TO STATE THE CRUCIAL DECISIONS BY THE COURT OF APPEALS RESPECTING THE DEFICIENCIES IN PETITIONERS' EFFORTS TO PROVE THEIR AFFIRMATIVE DEFENSES [45] OR TO SUSTAIN THE BURDEN OF PROOF STEMMING FROM 25 U.S.C. 194**

None of the Petitioners correctly states (a) the rationale of the opinions of the Court of Appeals or (b) the basic decision rendered by it. Rather, Petitioners complain that the Court of Appeals has, in some manner, failed properly to apply the laws of the State of Nebraska respecting accretions and avulsions. Petitioners failed to offer other than conjectural or speculative evidence as to (a) the erroneous allegations that Blackbird Bend was obliterated and (b) the erroneous allegations that the Blackbird Bend Area was replaced by accretions to the Iowa shore.

Seldom has a court made a more thorough and complete review of the oral and documentary evidence comprising the record from the trial court than that which was undertaken and completed by the Court of Appeals in its earlier opinion.[46] This statement is taken from the Court of Appeals:

> "The basic finding essential to the defendant's [Petitioner's] case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land

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[45] See, p. 22, *supra.*

[46] See, pp. 24, *et seq.*, note 50, *infra.*

> . . . by the gradual process of deposition within the Blackbird Bend area. . . .' " [47]

As to that "finding essential" to Petitioners' cases, the Court of Appeals said this:

> "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." [48]

Following that crucial rejection of the "finding essential" to the Petitioners, the Court of Appeals reviewed each and every aspect of the evidence introduced into the record by the Petitioners. Repeatedly, the deficiencies of the evidence that Petitioners offered were declared to be conjectural or speculative.[49] Every phase and every facet of the proof required by Petitioners in support of their claims set forth in their affirmative defenses and under 25 U.S.C. 194 were deficient. In every instance, the evidence offered was speculative, conjectural and predicated upon "educated guesses." [50] Reasons for the non-

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[47] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A39, "VI. The 1875-1879 Movement of the Thalweg"; Wilson v. Omaha, 575 F.2d 620, 639 (CA 8, 1978).

[48] *Ibid.*, at A39-A40; 575 F.2d 620, 639 (CA 8, 1978).

[49] *Ibid.*, at A42; 575 F.2d 620, 640 (CA 8, 1978): "Our analysis of the record leads us to conclude that the evidence presented at trial as a matter of law was insufficient to satisfy the defendants' burden of proving by the preponderance of the evidence that erosion and accretion were responsible for the significant shifts of the river between 1875 and 1879."

[50] *Ibid.*, at A39-A40; 575 F.2d 620, 639 (CA 8, 1978); A42; 575 F.2d 620, 640 (CA 8, 1978).

A44; 575 F.2d 620, 641 (CA 8, 1978): Relative to the identifiable land in place, "We find the evidence concerning bar C to be highly conjectural as to whether it formed by accretion or was in fact identifiable land in place."

[Footnote continued on page 25]

[50] [Continued]

A46; 575 F.2d 620, 642 (CA 8, 1978): ". . . any inferences drawn from the alleged land forms exhibits on the 1879 map appear to be highly conjectural. Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility."

A48; 575 F.2d 620, 643 (CA 8, 1978): "Thus, the testimony is inconclusive as to whether the remnant channel was formed by accretion or avulsion since a remnant chute might also have been formed after the thalweg suddenly and perceptibly moved."

A49; 575 F.2d 620, 643 (CA 8, 1978): "None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstance shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion."

A49; 575 F.2d 620, 643 (CA 8, 1978): ". . . as we have discussed the actual surface positioning of those bars based on the 1879 map is conjectural since the contours were drawn at the high water stage which existed at that time."

A55; 575 F.2d 620, 646 (CA 8, 1978): "Based on the foregoing analysis we find the factual predicate . . . is in large part conjectural and the opinions drawn therefrom must be viewed as speculative."

A56; 575 F.2d 620, 646 (CA 8, 1978): The Court of Appeals succinctly disposed of the trial court's findings as proposed by the Petitioners here in these words: "The trial court felt these facts 'simply [show] the normal and logical progression of the accretion which was shown to be forming in 1879. . . .' 433 F.Supp. at 79. There exists no factual predicate whatsoever to support this conclusion."

A59; 575 F.2d 620, 648 (CA 8, 1978): "In reviewing the record, we cannot but echo the words . . . that it is again only an 'educated guess' as to just how the river moved. The extremely speculative assessment of the reasons for the river's movement offered by the defendants is not sufficient to sustain their burden of proof."

[Footnote continued on page 26]

evidentiary character of the testimony of Petitioners' witnesses stems from these irrefutable facts:

1. In the words of the Court, the Blackbird Bend Area of the Omaha Indian Reservation

> ". . . was long occupied by the Tribe as part of the [Omaha Indian] reservation set apart for it in consequence of the treaty of 1854." [51]

2. Though Petitioners' entire case turned upon the alleged obliteration of the Blackbird Bend Area, their witnesses did not and could not prove that the land had indeed been washed away.[52] Every exhibit offered into the record disclosed that the Blackbird Bend Area had *not* been obliterated and washed

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[50] [Continued]

A62; 575 F.2d 620, 649 (CA 8, 1978): "We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194."

A63; 575 F.2d 620, 650 (CA 8, 1978): "While reasoned deductions may be made from probative facts, the ultimate conclusion may not rest on mere guesswork."

A65; 575 F.2d 620, 650 (CA 8, 1978): "We conclude on the basis of an overall review of the record that it is entirely speculative to determine when or how the thalweg moved to the position shown on the 1923 map."

A65; 575 F.2d 620, 650-51 (CA 8, 1978): ". . . we hold the defendants' case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194."

[51] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 669 (1979).

[52] App. to Pet., Wilson, *et al.*, No. *78-160*, pp. A10-A12, Plates I, II, III, IV; 575 F.2d 620, 625-27 (CA 8, 1978).

away as testified to by Petitioners' witnesses. Hence, their testimony was nonevidentiary by reason of the conjecture and speculative nature of the opinions rendered by the experts, all as reviewed in specific detail by the Court of Appeals.[53]

3. Having failed to prove that the Blackbird Bend Area was obliterated, it follows *a fortiori* that the Petitioners must necessarily fail in their assertion that the land was replaced by accretions.

4. Moreover, by "substantial conflicting evidence" offered into the record by the Tribe, it is beyond question that there were no accretions to the Iowa bank which could have replaced the Blackbird Bend Area.[54]

It was admitted by a principal witness of the Petitioners, Dr. Hallberg, that he could not testify relative to the alleged "obliteration" of the Blackbird Bend. Rather, with candor, he admitted that his testimony ". . . is indeed an educated guess. . . ." [55]

As the Court of Appeals pointed out in its most recent decision:

> "Evidence of river movement in the critical periods too often gives no more than a basis for an 'educated guess,' in the words of defendants' expert witness, Dr. George Hallberg." [56]

The Petitioners' principal witness Dr. Kennedy perhaps lacked the candor of Petitioners' witness Dr. Hall-

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[53] See, pp. 24-26, note 50, *supra.*

[54] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A24; 575 F.2d 620, 633, note 22 and documentation (CA 8, 1978).

[55] App. on Writ of Certiorari * * * Wilson, *et al.*, No. *78-160*; State of Iowa, *et al.*, No. *78-161*, p. 242.

[56] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 46; 614 F.2d 1153, 1161 (CA 8, 1980).

berg. He nevertheless admitted that he was unable to testify with specificity in regard to accretions to the Iowa bank. Indeed, Dr. Kennedy did not know whether there were accretions to the Iowa bank. This is Dr. Kennedy's statement:

> "I cannot say specifically that they were merged [alleged accretions] together here or at this point or at some other point. All I can say is I would *expect* as rivers normally behave for this to be an area of deposition, and deposition would occur *preferentially* along the Iowa bank." [57]

The Appellate Court recognized that "expectations" and "preferences" do not constitute evidence. As a consequence, the Court of Appeals repeatedly rejected, as speculative and conjectural, the opinion evidence of Petitioners' principal witnesses.

Reference will now be made to the complaints of Petitioners respecting the Opinion of January 15, 1980, rendered by the Court of Appeals.

On the background of the all-encompassing failures by Petitioners to sustain the burden of proof undertaken by them in their affirmative defenses and that which stems from 25 U.S.C. 194, Petitioners complain that there was not adherence to the laws of the State of Nebraska by the Court of Appeals.

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[57] App. on Writ of Certiorari * * * Wilson, *et al.*, No. *78-160*; Iowa, *et al.*, No. *78-161*, pp. 255-56. [Emphasis supplied]

**COURT OF APPEALS STRICTLY AND CORRECTLY APPLIED NEBRASKA LAW AS MANDATED BY THE COURT—PETITIONERS FAILED TO OVERCOME THE BASIC ISSUE CONFRONTING THEM: THEIR SELF-DEFEATING, SPECULATIVE, CONJECTURAL NONEVIDENTIARY TESTIMONY AND DOCUMENTS**

Petitioners Wilson, *et al.*,[58] RGP, Inc., *et al.*,[59] and the State of Iowa, *et al.*, complain about the decision rendered by the Court of Appeals. It will be observed that the Petitioners all variously assert that the Court of Appeals did not apply the law of Nebraska respecting accretions and avulsion as the Petitioners perceive those laws to be. What the Petitioners did not do—perhaps would not do—is to admit that their problems stem not from the interpretation of the laws of Nebraska, as expressed by the Court of Appeals, but rather their problems stem from the deficiencies of the evidence that they offered in support of their affirmative defenses and the

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[58] Pet. Wilson, *et al.*, No. 79-1741, "Questions Presented For Review," p. 4:

> "1. Whether the Court of Appeals erred in holding that the District Court did not correctly interpret the Nebraska law of accretion and avulsion.
>
> "2. Whether the Court of Appeals erred in holding that the District Court did not properly apply the Nebraska law of accretion and avulsion to the facts of this case."

[59] Pet. RGP, Inc., *et al.*, No. 79-1744, "Question Presented For Review," p. 3:

> "Whether the Eighth Circuit Court of Appeals erred in its construction of 25 U.S.C. § 194 by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process. . . ."

burden of proof required by 25 U.S.C. 194, the effect of which, in the words of the Court, was ". . . triggered once the Tribe makes out a prima facie case of prior possession or title to the . . . ." Blackbird Bend Area.[60] That failure, which resulted in the Court of Appeals declaring "clearly erroneous" the crucial findings of the District Court, is inextricably interrelated to Petitioners' complaints against the Appellate Court's decision respecting the laws of the State of Nebraska.

**FAILURE OF PETITIONERS TO SUSTAIN THEIR BURDEN OF PROOF STRIPS ALL MERIT FROM THEIR COMPLAINTS AGAINST THE OPINION OF THE COURT OF APPEALS**[61]

A vast preponderance of the issues raised by Petitioners is irrelevant. What is crucial but not discussed by Petitioners is Petitioners' failure to prove accretions to the Iowa bank in conformity with the laws in general and the law of Nebraska in particular. Succinctly and correctly, the Court of Appeals defined accretions within the contemplation of the law of Nebraska as follows:

> "As Nebraska case law makes clear, this basic statement of accretive change in the Missouri River has two elements. First, a boundary changes *only where the River's change of channel is caused by a process of erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other—the land between the old and new channels must be completely disintegrated.*" [62]

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[60] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 652, 668 (1979).

[61] See, pp. 23, *et seq.*, *supra.*

[62] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 38-39; Wilson v. Omaha, 614 F.2d 1153, 1158 (CA 8, 1980). [Emphasis supplied]

An abundance of authority supports that basic proposition of Nebraska law defining accretions.[63] Thus it was that the Petitioners were required to prove that the Missouri River eroded in a westerly direction destroying the right, west or Nebraska bank of the River in its course around Blackbird Bend.[64] Additionally, to prove accretions pursuant to the laws of the State of Nebraska, the Petitioners were required to prove—and they failed to do so—that the Nebraska, west or right bank of the Missouri River had been completely replaced by silt and deposition attaching to the easterly high bank, which is the left or Iowa bank of the stream. There is not a scintilla of evidence in the record to support accretions to that bank. Indeed, the Tribe proved by substantial evidence that there were no accretions to the Iowa bank.[65]

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[63] Jones v. Schmidt, 170 Neb. 351, 102 N.W.2d 640 (1960); State v. Eckland, 147 Neb. 508, 23 N.W.2d 782, 789-90 (1946); Mercurio v. Duncan, 131 Neb. 767, 269 N.W. 901 (1936); Commissioner of Land Office v. United States, 270 Fed. 110, 113 (CA 8, 1920).

[64] See, Plate I, Sketch of River's position in approximately 1875, showing 1852 Anderson and 1867 Barrett survey meander lines; App. to Pet., Wilson, *et al.*, No. *78-160*, p. A10; Omaha v. Wilson, 575 F.2d 620, 625 (CA 8, 1978).

It will be observed that accretions had proceeded eastward to the easterly high bank, as designated on that Plate. It will likewise be observed that the bed of the River was 800 feet in width in 1875 and was 800 feet in width subsequent to the flooding. App. to Pet., Wilson, *et al.*, No. *78-160*, pp. A8, A45; Omaha v. Wilson, 575 F.2d 620, 624, 642 (CA 8, 1978).

[65] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A24, note 22; 575 F.2d 620, 633 (CA 8, 1978): "The Tribe having presented substantial conflicting evidence on the issue of accretion, any presumption of accretion disappeared and had no further effect on their case."

Having failed to prove obliteration of the 2900 acres of Blackbird Bend and the replacement of it by accretions to the Iowa, left or eastern bank of the Missouri River, the Petitioners failed to sustain their burden of proof either under their affirmative defenses [66] or pursuant to 25 U.S.C. 194. On the subject, the Court of Appeals, in its earlier decision, said this:

> "It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines. This historical fact shows 'previous possession or ownership' and is sufficient to raise a presumption of title in the Tribe under the statute and place the burden of proof on the defendants." [67]

Having again reviewed the issue of the failure of the Petitioners to sustain their burden of proof, the Court of Appeals emphasized that the only evidence offered by Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*,

> ". . . demonstrated only speculative and conjectural evidence of their right to have title to the reservation land, which was granted to the Tribe by the Treaty of 1854, quieted in them. We hold that those parties failed to sustain the burden of proof placed upon them by 25 U.S.C. § 194 and title to the land in question should be quieted in the Tribe." [68]

Petitioners have assiduously refrained from admitting the main thrust and rationale of the most recent opinion of the Court of Appeals, which they request the Court to review. Rather, they discuss elements of the Opinion

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[66] See, pp. 23, *et seq., supra.*

[67] App. to Pet., Wilson, *et al.*, No. *78-160,* pp. A21-A22; Omaha v. Wilson, 575 F.2d 620, 631 (CA 8, 1978).

[68] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 35; Omaha v. Wilson, 614 F.2d 1153, 1155-56 (CA 8, 1980).

of the Court of Appeals which are, under the factual statement here, largely irrelevant.

Petitioners, in their extensive review of the rapidity with which accretions may transpire, totally overlook the crux of the opinions of the Court of Appeals.[69] Their statements on the question of the rapidity with which accretions may take place are in complete accord with the opinions of the Court of Appeals.[70] However, the issue of the rapidity of accretions has no relevancy here. Rather, Petitioners failed to prove accretions—rapid or otherwise—within the purview of the law of Nebraska on the subject.[71]

Contrasts between accretions and avulsions comprise most of the Petitioners' statements to the Court.[72] Petitioners cite virtually identically the same cases as those relied upon by the Court of Appeals. Petitioners' problems, however, are not overcome by extended citations. Their problem, as emphasized throughout, is their failure to prove accretions and erosions requisite to sustain their affirmative defenses and to fulfill their obligations under 25 U.S.C. 194. Petitioners' citations do not change the fact that the expert opinions of Petitioners were speculative and conjectural by reason of the failure to offer a factual predicate upon which those opinions would be

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[69] Pet. Wilson, *et al.*, No. 79-1741, p. 14, 1.A; Pet. State of Iowa, *et al.*, No. 79-1779, pp. 13, *et seq.*

[70] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 38, *et seq.*; Omaha v. Wilson, 614 F.2d 1153, 1158 (CA 8, 1980); Omaha v. Wilson, 575 F.2d 620, 635 (CA 8, 1978).

[71] See, pp. 23, *et seq.*, *supra.*

[72] Pet. Wilson, *et al.*, No. 79-1741, "C," pp. 33, *et seq.*; Pet. RGP, Inc., *et al.*, No. 79-1744, pp. 9, *et seq.*; Pet. State of Iowa, *et al.*, No. 79-1779, pp. 9, *et seq.*

accepted.[73] Those speculative and conjectural opinions resulted in the Court of Appeals declaring repeatedly that the trial court's findings on crucial issues were "clearly erroneous." [74]

**IN-DEPTH REVIEW OF NEBRASKA LAW BY COURT OF APPEALS RESULTS IN CORRECT AND EXPLICIT STATEMENTS OF THE LAW OF NEBRASKA PERTAINING TO ACCRETIONS AND AVULSIONS**

Petitioners did not say but should have that their problem pertained to their failure to sustain the burden of proof rather than the application of the law by the Court of Appeals.[75] Rather than acknowledging the crucial issue of failure to sustain their burden of proof, the Petitioners attacked the Court of Appeals for its alleged failure to interpret the Nebraska law as the Petitioners would have it.

Main thrust of the earlier opinion of the Court of Appeals, respecting the decision of the District Court, is stated in these terms:

> "We find the district court too narrowly focuses on identifiable land in place as the sole criterion of avulsion without giving proper weight to the plaintiffs' theory of their case and to the factual record presented." [76]

In its recent opinion, which Petitioners request the Court to review, the Court of Appeals reiterates and re-

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[73] See, pp. 23, *et seq., supra.*

[74] See, pp. 23, *et seq., supra.*

[75] See, pp. 23, *et seq., supra.*

[76] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A27; Omaha v. Wilson, 575 F.2d 620, 634 (CA 8, 1978).

affirms its conclusion that the District Court too sharply limits the law of avulsion by constituting identifiable land in place as the immutable criterion for determining the occurrence of an avulsion. On the subject, the Court of Appeals stated:

> "We conclude both Nebraska and federal common law apply the same basic definitions of avulsion and accretion to boundary disputes caused by a river channel change. We hold the district court incorrectly interpreted the Nebraska cases to hold that all river movements, other than those in which intervening land above the high water mark is identifiably in place, are included within the term accretion." [77]

Following that statement, the Court of Appeals alludes to Petitioners' gravest difficulty here—failure to sustain their burden of proof. This sttaement is taken from that opinion by the Court of Appeals:

> "Even assuming the district court properly interpreted Nebraska law, nonetheless our review of the record demonstrates the district court findings are clearly erroneous." [78]

Continuing, the Court of Appeals, paraphrasing its earlier opinion which was predicated upon an infinitely exact and detailed review of the record of the evidence in the trial court,[79] said this:

> "Even if it is assumed that identifiable land in place is the *sine qua non* of avulsive movement, the evidence of identifiable land in place or the lack thereof is simply too inconclusive, too dependent on spec-

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[77] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 45; Omaha v. Wilson, 614 F.2d 1153, 1160 (CA 8, 1980).

[78] *Ibid.*, at p. 46; 614 F.2d 1153, 1160 (CA 8, 1980).

[79] See, pp. 34, *et seq.*, *supra.*

ulation and conjecture, to support the inference of accretive change." [80]

It is believed that successful challenge cannot be interposed to the last-quoted summary of the Court of Appeals. Most assuredly, all of the issues presented here by the Petitioners in regard to the law of the State of Nebraska turn upon the question of whether the Court of Appeals correctly determined that the crucial findings of the trial court were "clearly erroneous." It is believed that the Court, after a comparable, intensive review of the record of the District Court, as was undertaken by the Court of Appeals, would agree with the Court of Appeals in its assessment of the findings which it declared were "clearly erroneous." Having accomplished that intensive assessment of the trial court's record, there is every reasonable prospect that the Court would also agree with the Court of Appeals that it correctly applied the law of Nebraska relative to accretions and avulsions.

**Nebraska's Law Does Not Establish Identifiable Land In Place As An Immutable Criterion To Proving An Avulsion**

Nebraska's Supreme Court has repeatedly reviewed with great care the principles which pertain to the laws of accretion and avulsion. Those cases were exhaustively analyzed by the Court of Appeals. Comment has already been directed to the principle of law, as enunciated by the Supreme Court of Nebraska, respecting accretions: "Erosion must be shown. . . ." [81] Petitioners failed to prove that erosion. Additionally, Petitioners failed to prove deposition of silt and sediment to the left, east or Iowa bank.[82] Petitioners' problems, stated succinctly, are as

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[80] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 46; Omaha v. Wilson, 614 F.2d 1153, 1160-61 (CA 8, 1980).

[81] See, pp. 30, *et seq.*, *supra.*

[82] See, pp. 30, *et seq.*, *supra.*

follows: The facts are against them; they cannot change those facts. Criticism of the Court of Appeals will not change the facts. That the Missouri River, in relatively short periods of time, drastically, abruptly and completely changed its course is free from doubt.[83] The Missouri River did not erode away the Nebraska or west bank when it made the change. It did not accrete to the Iowa bank when it left its channels. Those are elements required by the laws of Nebraska to be proved by the Petitioners. In *Mitchell* v. *Beerman*,[84] the Nebraska Supreme Court declared that where, as here, accretions are affirmatively pleaded by a defendant, ". . . the burden was on the defendants of proving the accretion by a preponderance of the evidence." [85] Because Petitioners' evidence was nebulous in the extreme, speculative and conjectural, they failed to sustain the burden of proof that Nebraska law says rested with them.

None of the Nebraska decisions, reviewed in detail by the Court of Appeals and the Petitioners, declares that proof of identifiable land in place is an immutable criterion in establishing an avulsion.

*Conkey* v. *Knudsen* [86] is heavily relied upon by Petitioners. That decision does not support the contentions of Petitioners. The *Conkey* decision cites *Nebraska* v. *Iowa* [87] and declares that when ". . . from any cause [a stream] suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary. . . ." [88] As the Court of Appeals points out:

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[83] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 45-46; Omaha v. Wilson, 614 F.2d 1153, 1160 (CA 8, 1980).

[84] 175 Neb. 616, 122 N.W.2d 525 (1963).

[85] *Ibid.*, at 527.

[86] 143 Neb. 5, 8 N.W.2d 538 (1943).

[87] 143 U.S. 519 (1892).

[88] 143 Neb. 5, 8 N.W.2d 538, 541 (1943).

> "*Conkey* II does mention absence of identifiable land, but nevertheless gives the basic common law definition of avulsion: 'Avulsion is the sudden and rapid change in the course and channel of a river.' " [89]

The *Conkey* decision tends fully to support the concept of the Court of Appeals which, as that Court correctly declares, is that

> ". . . identifiable land in place may have some probative value that erosion [the existence of which is essential to have an accretion under Nebraska law] has not occurred." [90]

It is abundantly manifest that Petitioners not only failed to sustain their burdens of proof by sound evidence, they failed to meet the requirements of the laws of the State of Nebraska in regard to the proof of accretions. Let it be emphasized that it was their burden to prove erosion and acretion—not avulsion.

## PETITIONERS' STATEMENTS REQUIRE CORRECTIONS

### A. Petitioners Wilson, *et al.*, No. 79-1741

Petitioners Wilson, *et al.*, contrary to fact and without documentation—there is nothing in the record to support the misstatements—state that:

> "The Court of Appeals concedes that there was no identifiable fast land (bank or island) or even *identifiable* riverbed (shore or sandbar) left in place as the thalweg in the Blackbird Bend moved west be-

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[89] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 42; Omaha v. Wilson, 614 F.2d 1153, 1142, note 7, citing Conkey v. Knudsen, 143 Neb. 5, 10, 8 N.W.2d 538, 541 (1943).

[90] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A35; Omaha v. Wilson, 575 F.2d 620, 637 (1978).

> tween 1867 and 1879, or as it moved south from the north high bank between 1906 and 1923 or 1927." [91]

That statement is wholly fabricated. Never did the Court of Appeals make such a statement, much less such a concession. Indeed, the earlier opinion of the Court of Appeals refutes Petitioner Wilson's statement *en toto*. Magnitude of the error in the statement quoted from Petitioners Wilson, *et al.*, is easily demonstrated by reference to the plates set forth in the opinion of the Court of Appeals. Reference in that connection is made to Plate II, "The 1879 Missouri River Commission Survey Map." There, the Missouri River is at flood stage in June, 1879. In discussing Plate II, the Court of Appeals had this to say:

> "At the time the river was shown to be nearly 10,000 feet wide. . . . Soundings taken at that time demonstrate that a substantial land area was immediately below the surface of the flood water." [92]

To be observed from the cited plate is the fact that a large portion of the Blackbird Bend Area was not submerged. That area was covered with heavy tree growth. Far from being destroyed, the area in question was occupied for many years by the Omaha Indian Tribe, a fact taken into consideration by the Court.[93] Petitioners Wilson, *et al.*, throughout the Petition, fail to document most of the statements that are made.

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[91] Pet. Wilson, *et al.*, No. 1741, p. 12.

[92] App. to Pet., Wilson, *et al.*, No. *78-160*, p. 11, Plate II, Court of Appeals' statement at A45; Omaha v. Wilson, 575 620, 626, Court's comment at p. 642 (CA 8, 1978).

[93] "There seems to be no question here that the area within the Barrett survey . . . was long occupied by the Tribe. . . ." App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Omaha v. Wilson, 442 U.S. 653, 669 (1979).

Misstatements by Petitioners Wilson, *et al.*, as to the 1906-1923-1927 period are easily exposed and refuted. Plate III establishes the Barrett Survey of the 2900 acres of land in 1867. Plate IV locates the 2900 acres of land in 1923, after the Missouri River had moved left.[94]

Respecting Petitioners' testimony on the subject of the alleged obliteration of the 2900 acres, the Court of Appeals declared that the testimony could not be accepted as evidence because it comprised an "educated guess" by one of Petitioners' principal witnesses.[95]

**B. Petitioners RGP, Inc., *et al.*, No. 79-1744**

Reference is also required to statements in the Petition of RGP, Inc., *et al.* Those statements, like the statements by Petitioners Wilson, *et al.*, depart from the facts. Moreover, they have no relationship whatever to the rulings by the Court of Appeals. It is stated, for example, without reference or documentation that:

> "The construction of § 194 by the Court of Appeals, in effect, establishes a *presumption of avulsion* when applied to the movements of the Missouri River over 100 years ago." [96] [Emphasis RGP, Inc.]

Petitioners RGP, Inc., *et al.*, gravely err in making that statement. There is no suggestion by the Court of Appeals; no statement that could reasonably be construed to support the allegation that there is a "presumption" of avulsion. The Tribe respectfully submits, however, that it did prove avulsive movement of the Missouri River.[97]

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[94] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A12; Omaha v. Wilson, 575 F.2d 620, 627 (CA 8, 1978).

[95] *Ibid.*, at p. A59; 575 F.2d 620, 648 (CA 8, 1978).

[96] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 14.

[97] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 45-46; Omaha v. Wilson, 614 F.2d 1153, 1160 (CA 8, 1980).

The same statement is contained in the earlier part of RGP's Petition, where it is stated:

> "Even the Eighth Circuit Court of Appeals acknowledges that the presumption, as applied to this case, becomes irrebutable and conclusive as against these petitioners, thereby denying them the fair opportunity to repel it." [98]

Let it be respectfully submitted that, at no time, did the Court of Appeals even suggest that there was a presumption of any kind involving the Petitioners, much less an "irrebutable and conclusive" presumption.[99]

The Tribe views as unfortunate the statements made. The Court of Appeals adhered to the law throughout and at no time is it suggested by the Court of Appeals that there are "presumptions" against the Petitioners.

### C. Petitioners State of Iowa, *et al.*, No. 79-1779

A final judgment has not been entered in the District Court respecting the claims of Petitioners State of Iowa, *et al.*[100] As suggested above, Iowa's Petition is premature.

Reference, nevertheless, will be made to the several questions presented by Petitioners Iowa, *et al.* It is urged there that the Court of Appeals' Opinion is inconsistent with the Court's mandate in *Wilson* v. *Omaha.* Yet, Iowa fails to document or, indeed, to specify the alleged inconsistencies.[101] Iowa urges, contrary to the fact, that

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[98] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 6.

[99] *Ibid.*

[100] See, pp. 10, *et seq.*, *supra.* App. to Pet., Wilson, *et al.*, No. 79-1741, p. 47; Omaha v. Wilson, 614 F.2d 1133, 1161 (CA 8, 1980).

[101] Pet. State of Iowa, *et al.*, No. 79-1779, p. 9.

the Court of Appeals declared that Nebraska law ". . . was identical to the federal rule." [102] What the Court of Appeals stated is that those laws "do not differ substantially" and proceeded fully to document that conclusion.[103] The State of Iowa fails to take cognizance of the main thrust of the opinion of the Court of Appeals. Not mentioned is the failure of Petitioners to sustain their burden of proving their affirmative defenses or to meet the requirements of 25 U.S.C. 194.[104] There, it will be observed that the State counterclaimed asserting that the Blackbird Bend Area had been completely obliterated and washed away. There is no merit to that contention.[105]

Though Petitioners Iowa, *et al.*, assert that the Court of Appeals departed from Nebraska law, they do not document where or to what extent that departure exists. Hence, the charges remain purely speculative and generalized.[106]

Entirely overlooked by the Petitioners Iowa, *et al.*, is that the Court, in *Wilson* v. *Omaha*, affirmed the Court of Appeals in its holding that the Tribe, when it proves its *prima facie* case, by proof of both "previous possession" and "ownership," establishes a "presumption of title," pursuant to 25 U.S.C. 194. After those circumstances, the burden of proof moved to Petitioners and they failed to sustain that burden.[107]

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[102] *Ibid.*, p. 10.

[103] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 36, *et seq.*; Omaha v. Wilson, 614 F.2d 1153, 1156, *et seq.* (CA 8, 1980).

[104] See, pp. 19-20, note 36, *supra.*

[105] See, pp. 19-20, note 36; pp. 22, *et seq.*, p. 24, note 50, *supra.*

[106] Pet. State of Iowa, *et al.*, No. 79-1779, pp. 14, *et seq.*

[107] App. to Pet., Wilson, No. 17-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

Charges by Petitioners State of Iowa, *et al.*, that the Court of Apepals has not shown due "deference" to the laws of the State of Nebraska simply is without merit. Quite clearly, the Petitioners State of Iowa, *et al.*, have not considered the in-depth analysis of the laws of the State of Nebraska in the first opinion of the Court of Appeals or its most recent decision.[108]

The State of Iowa suggests that the Court should "exercise supervisory jurisdiction" over the Court of Appeals. In response to that, the Tribe points out that the Court has exercised that jurisdiction and there has been full compliance with the mandate of the Court by the Court of Appeals.

Finally, it is asserted that the decision of the Court of Appeals will, in some manner, adversely affect the subsequent decisions involving the same subject matter. Once again, reference is made to the fact that Iowa's judgment is not yet final. However, the point that it raises is lacking in merit by reason of the great care with which the Court of Appeals rendered its opinion. It is again respectfully emphasized that the Petitioners State of Iowa, *et al.*, and the other Petitioners have failed to take cognizance of the main thrust of the Court's opinion and that of the Court of Appeals: The obligation of the Petitioners to sustain their burden of proof which, as the Court of Appeals on two occasions has declared, they have failed to do.

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[108] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A31, see notes 30, *et seq.*; Omaha v. Wilson, 575 F.2d 620, 636, *et seq.* (CA 8, 1978). See the comprehensive analysis of "Nebraska Case Law" in the most recent opinion of the Court of Appeals, App. to Pet., Wilson, *et al.*, No. 79-1741, p. 36, Wilson v. Omaha, 614 F.2d 1153, 1156, *et seq.* (CA 8, 1980).

As construed and applied by the Court[109] and the Court of Appeals,[110] the constitutionality of 25 U.S.C. 194 is manifest. Petitioners, in their early request to the Court to review the issues, raised the question of the constitutionality of 25 U.S.C. 194.[111] This Court refrained from considering the question of the constitutionality of the provision. In explicit detail, the history of 25 U.S.C. 194 was reviewed by the Court.[112] It is implicit in the decision rendered by the Court that 25 U.S.C. 194 was an appropriate exercise by Congress of its constitutional and plenary power over Indian affairs. Repeatedly, the Court has recognized and upheld that power in Congress. It has acted to provide means which fulfill the "compelling governmental interest" to protect Indians in their ownership and possession. Quite obviously, 25 U.S.C. 194, as applied by the Court, comes within the purview of that concept. In *Oneida Indian Nation* v. *County of Oneida*,[113] the Court refers to the "almost countless cases" recognizing the primacy of federal law where Indian interests are involved and upholding the power of Congress to enact legislation of the character here involved.

Rationale of the Court's Opinion and the concepts there enunciated are in keeping with its earlier decisions.[114]

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[109] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 10, *et seq.*, pp. 16, *et seq.*; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[110] *Ibid.*, at p. 33; Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[111] See, pp. 5, *et seq.*, *supra.*

[112] App. to Pet., Wilson, *et al.*, No. 79-1741, II, pp. 10, *et seq.*, see, in particular, pp. 16, *et seq.*; Wilson v. Omaha, 442 U.S. 653, 664, particularly pp. 668-69 (1979).

[113] 414 U.S. 661, 667, 669 (1974).

[114] See, Worcester v. Georgia, 31 U.S. 515, 556 (1832); United States v. Santa Fe Pacific RR Co., 314 U.S. 339, 345,

**D. Misstatements By Petitioners Relative To Claimed Title And Occupancy**

Petitioners come within the purview of the objectives for which 25 U.S.C. 194 was enacted:

> "[The Court declared that it was] . . . to protect Indians from claims made by non-Indian squatters on their lands." [115]

It has been emphasized that Petitioners have no indicia of title—no patents.[116] Petitioners are "squatters." Whatever paper interests Petitioners may have is derived from "squatters" on the lands of the Omaha Indian Tribe.

Indeed, as the trial court so succinctly stated, relative to the non-title status of the Petitioners "squatters,"

> ". . . the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years." [117]

Petitioners or the "squatters," to whom they relate their claims, first squatted on the 2900 acres, title to which is the subject matter of these cases, in the 1940s. Most assuredly, there is no merit in the statement by Petitioners RGP, Inc., *et al.*, when they assert that they ". . . have farmed the property in dispute since the early

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347 (1941); Morton v. Mancari, 417 U.S. 535, 547, *et seq.* (1974); McClanahan v. Arizona, 411 U.S. 164, 174 (1973); Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); United States v. Rickert, 188 U.S. 432, 442-43 (1903).

[115] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 12; Wilson v. Omaha, 442 U.S. 653, 665 (1979).

[116] See, pp. 18, *et seq., supra.*

[117] App. on Writ of Certiorari, Wilson, *et al.*, No. *78-160*; State of Iowa, *et al.*, No. *78-161*, Order filed June 5, 1975, United States District Court, p. 119 at p. 124.

1900's." [118] There is no agreement as to the exact time when Petitioners commenced their trespass upon the lands of the Omaha Indian Tribe. Petitioners State of Iowa, *et al.*, declare it was 1912.[119] Petitioners Wilson, *et al.*, acknowledge that the Tribe was in possession at least until 1927.[120] It is clear that Petitioners do not agree when they first "squatted" on tribal land. Far more important is the fact that Petitioners' trespasses upon the 2900 acres of Indian land caused the Omaha Indian Tribe irreparable and continuing damage.

Additionally on the position of the dubious character of Petitioners' claims, further reference is made to the June 5, 1975 Order, entered by the trial court. That court likewise recognized that ". . . the members of the Tribe have never totally acquiesced in defendants' [Petitioners'] use of the land. . . ." [121] The court then added:

> "Perhaps the true uncontested status was many years ago before the Missouri River changed its course. . . . the court views the present occupation by the Omaha Tribe . . . constitutes the status quo to be preserved." [122]

It is abundantly manifest that the complaints of Petitioners RGP, Inc., *et al.*, and others that the opinions of the Court and of the Court of Appeals do them an injustice are without merit. Rather, the Omaha Indian Tribe has suffered greatly from the trespasses by Petitioners, who have benefitted greatly by their agribusiness.

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[118] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 13.

[119] Pet. State of Iowa, *et al.*, No. 79-1779, p. 5.

[120] Pet. Wilson, *et al.*, No. 79-1741, p. 33.

[121] App. on Writ of Certiorari, Wilson, *et al.*, No. *78-160*; State of Iowa, *et al.*, No. *78-161*, Order filed June 5, 1975, United States District Court, p. 119 at p. 124.

[122] *Ibid.*

## THE COURT [123] AND THE COURT OF APPEALS [124] CORRECTLY CONSTRUED AND APPLIED 25 U.S.C. 194 AS A PROPER EXERCISE BY CONGRESS OF ITS PLENARY POWER OVER INDIAN AFFAIRS

The Court's review, analysis, interpretation and application of 25 U.S.C. 194 strongly buttresses the explicit decision of the Court of Appeals that the Act in question came within the purview of the plenary powers of Congress over Indian affairs, as delegated to the Legislative Branch by the Constitution.

Reference has been made above to the fact that writs of certiorari were not granted in regard to the constitutional questions originally presented by the Petitioners to the Court for review.[125] Limited character of the review, giving rise to *Wilson* v. *Omaha*, is stated by the Court in these terms:

> "We granted separate petitions for certiorari filed by the State of Iowa in No. 78-161 and by the individual petitioners in No. 78-160, but limited to the questions whether 25 U.S.C. § 194 is applicable in the circumstances of this case, in particular with respect to the State of Iowa, and whether federal or state law governs the substantive aspects of these cases." [126]

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[123] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 10, *et seq.*, see, in particular, pp. 16, *et seq.*; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[124] App. to Pet., Wilson, *et al.*, No. *78-160*, at pp. A15, *et seq.*; Wilson v. Omaha, 575 F.2d 620, 629, *et seq.* (CA 8, 1978); App. to Pet., Wilson, *et al.*, No. 79-1741, p. 33; Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[125] See, pp. 5, *et seq.*, *supra.*

[126] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 9-10; Wilson v. Omaha, 442 U.S. 653, 663 (1979).

The Court, the Tribe believes, was not unmindful that the constitutionality of 25 U.S.C. 194 had been challenged by all of the Petitioners.[127] Rather than considering the constitutional question, there was apparently adherence by the Court to its basic principles that it ". . . will not decide questions of a constitutional nature unless absolutely necessary to decide the case." [128] Justice Brandeis, in the cited opinion, described that concept to be "a cardinal principle" governing the Court's conduct when the validity of an act of Congress is challenged.[129]

Respect for the Legislative Branch by the Court gave rise to the doctrine of strict necessity—an act of Congress will not be voided as unconstitutional absent evidence that a mistake has been made by the Congress which is sufficiently clear that the issue is not open to rational question.[130] Congress, when it enacted 25 U.S.C. 194, most assuredly made no mistake. Cognizance of that fact was taken by the Court in its opinion.[131]

Petitioners RGP, Inc., *et al.*, in the second half of their question, raise this issue:

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[127] Pet. Wilson, *et al.*, No. *78-160*, p. 4, Question 1; Pet. State of Iowa, *et al.*, No. *78-161*, p. 2, Question 3; Pet. RGP, Inc., *et al.*, No. *78-162*, p. 2, Question Presented For Review. Petitioners RGP, Inc., *et al.*, presented a single question—Whether 25 U.S.C. 194, on its face and as construed, constitutes invidious racial discrimination against Petitioners.

[128] Ashwander v. TVA, 297 U.S. 288, 346-48 (1936).

[129] *Ibid.*

[130] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947); Calder v. Bull, 3 U.S. 386, 395, 399 (1798); Flemming v. Nestor, 363 U.S. 603, 611 (1960).

[131] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 10, *et seq.*, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

> ". . . whether 25 U.S.C. § 194 as construed by the United States Supreme Court and the Eighth Circuit Court of Appeals unconstitutionally creates an irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution." [132]

Response to that inquiry by Petitioners RGP, Inc., *et al.*, is stated by the Court in these words:

> "Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these acts as they developed was to protect the rights of Indians to their property." [133]

Continuing, the Court alluded to the scope of the congressional acts to protect the Indian properties:

> "Among other things, [the Act of which 25 U.S.C. 194 is a part] non-Indians were prohibited from settling on tribal properties, and the use of force [by the Executive Branch] was authorized to remove persons who violated these restrictions." [134]

To Petitioners' assertion that the Court of Appeals had erroneously applied 25 U.S.C. 194 to Indian Tribes and not to individual Indians, the Court said this:

> "We think the argument is untenable." [135]

In sustaining the Court of Appeals' opinion upholding 25 U.S.C. 194, the Court rejected the Petitioners' contentions in these words:

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[132] Pet. RGP, Inc., *et al.*, No. 79-1744; p. 3. To be noted is that the second question is not numbered.

[133] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 11; Wilson v. Omaha, 442 U.S. 653, 664 (1979). See, in that regard, 25 U.S.C. 180

[134] *Ibid.*

[135] *Ibid.*, at p. 10; 442 U.S. 653, 668-69 (1979).

> "It stands to reason that in re-enacting this provision . . . Congress was fully aware that it would be interpreted to cover artificial entities as well as individuals." [136]

Responding to Petitioners' defense of the District Court that to apply 25 U.S.C. 194 ". . . involves the issue on which this case turns. . . ." the Court declared:

> "We think the Court of Appeals had the better view of the statute in this regard." [137]

Having reviewed the fact that the Tribe had both "previous possession" and "ownership" under 25 U.S.C. 194, the Court stated:

> "This was eough . . . to bring § 194 into play." [138]

Finally, Petitioners RGP, Inc., *et al.*, raised the question of whether the Court of Appeals erred in its construction of 25 U.S.C. 194

> ". . . by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process. . . ." [139]

It is respectfully submitted that the Court of Appeals adhered strictly to this Court's interpretation and application of 25 U.S.C. 194.[140] Petitioners do not establish the basis upon which their contention is presented. Quite obviously, the Court of Appeals did not depart from what the Court said in its Opinion. Rather, as will be observed,

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[136] *Ibid.*, at p. 14; 442 U.S. 653, 667 (1979).

[137] *Ibid.*, at p. 16; 442 U.S. 653, 669 (1979).

[138] *Ibid.*

[139] Pet. RGP, Inc., *et al.*, p. 3.

[140] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

there was strict adherence to it.[141] As this Court emphasized:

> ". . . in view of the evident purpose of the statute and its use of the term 'presumption' which the 'white man' must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian [Petitioners] shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out [as it did] its prima facie case of prior title or possession." [142]

## CONCLUSION

Based upon the preceding review of the Petitions for Writs of Certiorari, the Court's Opinion of June 20, 1979, and the Opinions of the Court of Appeals, the Petitioners having been to the Court of Appeals on two previous occasions, it is respectfully submitted that the Petitions for certiorari should be denied.

Respectfully submitted,

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May 1980

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[141] *Ibid.*, at p. 34, "II. Nebraska Law," *et seq.*; Omaha v. Wilson, 614 F.2d 1153, 1155, *et seq.*, (CA 8, 1980).

[142] *Ibid.*, p. 17; Wilson v. Omaha, 442 U.S. 653, 669 (1979). [Emphasis supplied.]

Supreme Court, U. S.
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Nos. 79-1741, 79-1744 and 79-1759

# In the Supreme Court of the United States

OCTOBER TERM, 1979

ROY TIBBALS WILSON, ET AL., PETITIONERS
*v.*
OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

RPG, INC. ET AL., PETITIONERS
*v.*
OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

STATE OF IOWA, ET AL., PETITIONERS
*v.*
OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1741

ROY TIBBALS WILSON, ET AL., PETITIONERS

*v.*

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

---

No. 79-1744

RPG, INC. ET AL., PETITIONERS

*v.*

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

---

No. 79-1779

STATE OF IOWA, ET AL., PETITIONERS

*v.*

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the district court is reported at 433 F. Supp. 57 and 67. The first opinion of the court of appeals is reported at 575 F. 2d 620. The opinion of this Court on review of the first judgment of the court of appeals (A. 2-31)[1] is reported at 442 U.S. 653. The opinion of the court

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[1]"A." refers to the separate appendix to the petition in No. 79-1741.

of appeals on remand (~~Pet. App.~~ 31-48) is reported at 614 F. 2d 1153.

## JURISDICTION

The judgment of the court of appeals was entered on January 15, 1980. Timely petitions for rehearing were denied on February 8, 1980 (A. 49). The petitions for a writ of certiorari were filed on May 2 and May 7, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

25 U.S.C. 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the law of Nebraska to the facts of this case in determining that the private petitioners had not met their burden of persuasion to show that the Missouri River moved by accretion in eroding away the lands of the Omaha Indian Tribe between 1867 and 1923.

2. Whether 25 U.S.C. 194 creates a racial classification that violates the Due Process Clause of the Fifth Amendment.

## STATEMENT

Petitioners in these related petitions seek review of the decision of the court of appeals after this Court's remand

in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979).[2] The background of the litigation is set forth in the Court's prior opinion. *Id.* at 658-661. Briefly, the lands in question, then in Nebraska and bordering on the Missouri River, were confirmed to the Omaha Tribe pursuant to the Treaty of 1854. In 1867, a survey by T. H. Barrett of the General Land Office established that the reservation included a large peninsula jutting east toward the Iowa side of the river around which the river flowed in an oxbow curve known as Blackbird Bend. Since 1927, the river has been west of its 1867 position, leaving most of the area surveyed by Barrett on the Iowa side of the river, separated from the rest of the reservation. This area was occupied and farmed by non-Indian Iowa residents until April 2, 1975, when they were dispossessed by the Tribe with the assistance of the Bureau of Indian Affairs.

In this litigation, the Tribe and the United States (on behalf of the Tribe) seek to quiet title to ownership of a tract of land now on the east bank of the Missouri River in Iowa which was formerly in Blackbird Bend. The defendants are the State of Iowa and certain landowners in Iowa.[3] After trial without a jury, the district court ruled that the Tribe did not own the disputed land. The court held (i) that under an applicable compact between Iowa and Nebraska, Nebraska law governed the resolution of the property law questions, (ii) that under Nebraska law

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[2]We refer to petitioners in No. 79-1741 as "Wilson," to petitioners in No. 79-1744 as "RGP," and to amici Dahl and other amici farm operators as "Dahl."

[3]The State of Iowa (No. 79-1779) claims title to certain lands deeded to it by quitclaim and to the bed of the Missouri between the thalweg and the ordinary high-water mark, any islands formed in that portion of the river and any abandoned channels. See 442 U.S. at 657 n.2. The private parties (Nos. 79-1741 and 79-1744) claim title to or a right to occupy other portions of the disputed tract.

the Tribe could prevail only if it could show that the land on the Iowa side of the river had been cut off from the reservation by avulsion, (iii) that an avulsion may be found under Nebraska law only when "identifiable land in place" remains after the avulsion, (iv) that Blackbird Bend had been washed away and not severed by avulsion, (v) that the riparian lands in Iowa had been deposited by accretion, and (vi) that the presumption favoring Indians in 25 U.S.C. 194 (see page 2, *supra*) was inapplicable.

The court of appeals reversed. It held that the presumption of 25 U.S.C. 194 was applicable and that the defendants, as non-Indians, had not proven the disputed land was the product of accretion under federal common-law principles, which the court concluded were controlling. 575 F. 2d 620.

On writ of certiorari, this Court affirmed in part and reversed in part, holding: (i) the presumption in 25 U.S.C. 194 is applicable to all defendants except the State of Iowa (442 U.S. at 655-669), (ii) federal law governs the determination of the actual boundary of the reservation and hence the ownership of the disputed territory (*id.* at 669-671), and (iii) in the circumstances of the case, federal law should borrow the law of Nebraska in light of the interstate compact (*id.* at 678). The Court remanded the case to the court of appeals to consider whether the district court had correctly interpreted Nebraska law and had properly applied it to the facts of this case.

On remand, the court of appeals held that the district court had not properly applied Nebraska law to the facts of this case. Under Nebraska law, the court of appeals held (A. 37-39), the defendants could prevail only if the change was accretive. An accretive change has two elements (A. 38-39): (i) "a boundary changes only where the River's change of channel is caused by a process

of erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other—the land between the old and new channels must be completely disintegrated", and (ii) the erosion must be " 'gradual and imperceptible.' " although the court recognized that such erosion may sometimes occur rapidly. On the other hand, under Nebraska law, the court held (A. 41) that "avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood." Thus, the essential difference between accretion and avulsion is "between sudden and perceptible change and the process of erosion and gradual, imperceptible deposition" (*id.* at 42). The court rejected petitioners' and the district court's theory that an avulsion may be found only when there is "identifiable land in place," that is, when land in between the old and new channel can be traced to land in that position before the avulsion. Although the existence of identifiable land in place would be persuasive evidence of avulsion (*id.* at 43), the court held that lack of such evidence does not absolutely preclude a finding of an avulsion (*ibid.*). Applying these definitions of accretion and avulsion, the court held that all petitioners other than the State of Iowa had failed to prove accretion had occurred (*id.* at 46-48).

Moreover, the court held (A. 46) that even if identifiable land in place is a sine qua non of avulsive movement under Nebraska law, petitioners' proof was too speculative, in light of the burden of proof required by 25 U.S.C. 194, to support the conclusion that the change had been accretive. Since all petitioners other than the State of Iowa have the burden of proof under 25 U.S.C. 194, the court held that petitioners' proof failed to establish that the channel change had occurred through erosion.

Accordingly, as to those petitioners, the court directed judgment in favor of the Tribe and the United States.

Concerning the State of Iowa, as to which 25 U.S.C. 194 is inapplicable, the court observed (A. 47) that the "record is not clear as to the time period and as to the specific land involved, in the Tribe's claim that land allegedly owned by the State was cut away from the reservation by avulsion." The court remanded to permit the Tribe to point out specific evidence relied upon to show avulsion on the particular land claimed by the State so that the district court "may separately review whether the Tribe has sustained its burden of proof against the State" (*id.* at 47-48).

## ARGUMENT

The decision of the court of appeals is correct and properly applies the law of Nebraska to the facts of this case. There is no reason for this Court to review either the applicable rule of state law or the factual determinations of the court of appeals. As to the constitutionality of 25 U.S.C. 194, this Court's decisions establish that federal statutes may single out Indians for special protection and not violate constitutional standards. As this Court implicitly recognized in its previous decision in this case, 25 U.S.C. 194 is no exception.

1. Contrary to the argument of the State of Iowa (79-1779 Pet. 9-10), Wilson (79-1741 Pet. 14-30), and Dahl (Br. 9-10), conclusive evidence of "identifiable land in place" is not a sine qua non of an avulsion under Nebraska law. The court of appeals properly construed Nebraska law on this point.

a. Essentially, petitioners contend that in certain periods between 1875 and 1923 the river steadily cut through and washed away the 2900 acres of Blackbird

Bend, and other loose soil from upstream simultaneously accreted to the opposite bank. The Tribe and the United States essentially contend that for the periods 1875-1879 and 1912-1923 the river made one or more avulsive jumps westward cutting one or more chutes across the peninsula and eventually forcing a new thalweg at the base of the peninsula, creating "islands" between the old channel, the chutes, and the ultimate main channel. The district court ruled for petitioners because there was no convincing evidence of "identifiable land in place," that is, "a body of land * * * that after the shift * * * remains identifiable as land which existed before the change of the channel and which never became a part of the river bed" and is "capable of identification as such." 433 F. Supp. at 73, 88, 90. Despite the Tribe's and the government's evidence of avulsion (summarized at 575 F. 2d at 639-650), the district court held that the land in question was properly not part of Blackbird Bend but, rather, an accretion of silt to the Iowa bank from upstream and therefore the plaintiffs had not carried their burden of proof. 433 F. Supp. at 88.

Although accepting the district court's general statements of the law of Nebraska concerning accretions and avulsions, the court of appeals held that the district court erred in elevating evidence of identifiable land in place to a sine qua non of an avulsion under Nebraska law. The court of appeals held that on the facts of the present case it was entirely plausible that the disputed land was once part of Blackbird Bend even though there is no conclusive proof that permits such tracing. Evidence of identifiable land in place, the court held (575 F. 2d at 637; A. 43), is highly probative confirmation of an avulsion, but its absence does not automatically negate an avulsion. The same land may well be in place but not be identifiable as such. For the reasons set forth at length by the court of appeals (A. 34-37), the court of appeals

correctly applied Nebraska law to the unique circumstances of this case.[4]

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[4]Nothing in Nebraska law requires a showing of identifiable land in place in order for there to be an avulsion. To be sure, many Nebraska cases discuss the question of identifiable land in place, since if such land can be shown with certainty, then clearly an avulsion has occurred. Thus, the court of appeals acknowledged that the presence of identifiable land in place is often a significant factor in avulsion-accretion cases (A. 42-43). Nonetheless, no Nebraska case states that identifiable land in place is a sine qua non for an avulsion, and petitioners point to none. Petitioners place emphasis on *Conkey* v. *Knudsen, (Conkey II)*, 143 Neb. 5, 8 N.W. 2d 538 (1943) vacating 141 Neb. 517, 4 N.W. 2d 290 (1942); *Iowa R.R. Land* v. *Coulhard*, 96 Neb. 607, 148 N.W. 328 (1914); and *First National Bank* v. *McFerrin*, 142 Neb. 617, 9 N.W. 2d 167 (1943), as requiring identifiable land in place. None of those cases stand for that proposition. Thus, *Conkey II* merely holds that identifiable land in place is a factor which may be considered. *Iowa R.R. Land* was a case where all parties agreed that the river had moved by avulsion, 148 N.W. at 329, and the question of whether identifiable land in place was required never arose. *First National Bank* again does not require identifiable land in place for an avulsion; the precise holding merely submits to the jury the question of how the river actually moved in the pertinent time period.

Nor is the opinion of the court of appeals at war with *Wiltse* v. *Bolton*, 132 Neb. 354, 272 N.W. 197 (1937) (see 79-1741 Pet. 14-15). The court in *Wiltse* emphasized that the shift in the channel of the Missouri River involved in that case was by the gradual erosion and building up of land (272 N.W. at 199):

> As a result of the deposit of soil-building material during high water, Boyd's slough had gradually filled, so that there is no channel there now and has not been for many years. By the same process the sand-bar to the west of Boyd's slough has been built up until at the present time, a large portion of the same is suitable for cultivation.

Moreover, the court of appeals was clearly correct in stating that, under Nebraska law, the essential characteristic of an avulsion is a rapid change in the channel of the river. See, *e.g.*, *Valder* v. *Wallis*, 196 Neb. 222, 242 N.W. 2d 112, 114 (1976), which defined avulsion as " 'a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream.' "

b. Moreover, the issue is solely one of state law. No substantial federal question is presented within the meaning of Rule 19 of the Rules of this Court. Although this Court will review a federal decision on "an important state" issue decided "in a way in conflict with applicable state or territorial law" (see Rule 19(b)), no decision of any Nebraska court on similar facts holds that the absence of evidence of "identifiable land in place" precludes a finding of avulsion (see note 4, *supra*). In these unexceptional circumstances, "the considered determination of questions of state law by the intermediate federal appellate courts" (and, we add, by a panel of three active judges of the circuit in which Nebraska is included) does not warrant review. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

c. At all events, the issue whether identifiable land in place is a sine qua non of an avulsion is simply not presented by this case. The court held that, whether or not identifiable land in place is an element of avulsion, the private petitioners had not carried their burden of proof under 25 U.S.C. 194. There may well have been identifiable land in place in 1879 and in 1923.[5] Because of the paucity of maps and the lack of actual witnesses, it is impossible to know for certain. Petitioners' proof was simply too speculative to establish that such land was not in place. Thus, as to such petitioners, this case does not present the state-law issue urged by petitioners.

The State of Iowa's petition is premature. This Court does not ordinarily issue a writ of certiorari to review a decree of a court of appeals of an order remanding a case for further proceedings. *American Construction Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Firemen* v. *Bangor &*

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[5]See pages 11-12, *infra*, 575 F. 2d at 641; A. 46.

*Aroostock R.R.*, 389 U.S. 327, 328 (1967). The court of appeals remanded the present case to the district court to allow the Tribe and the United States, without the benefit of 25 U.S.C. 194, to point out specific evidence that establishes an avulsion. On remand, the State may ultimately prevail and thus obviate any quarrel by the State of Iowa with the court's analysis of Nebraska law. No extraordinary circumstances warrant this Court's review of this nonfinal aspect of the order.[6]

2. In similar vein, the State of Iowa (79-1779 Pet. 18) and Wilson (79-1741 Pet. 12, 19-22) attack the court of appeals' general statement of the rule of avulsion on the ground that it would theoretically comprehend a sudden shift of the thalweg from one part of the river bed to another part without any change in location of the bed itself. Such a result, they contend, would be inconsistent with Nebraska law.[7] It is clear, however, that that is not what happened in the present case. The river plainly did change its bed. This case does not present the issue of the

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[6]The State of Iowa (79-1779 Pet. 10-13) and Dahl (Br. 9-11) contend that review is warranted to settle the federal common law's definition of avulsion and accretion. That issue is plainly not presented by this case inasmuch as this Court and the court of appeals have held that the case is controlled solely by Nebraska law. The court of appeals' discussion of federal common law was merely dictum and is not determinative of any state's river rights.

[7]Inasmuch as Nebraska law is controlling, petitioners' reliance on the special master's report in *Louisiana* v. *Mississippi*, 384 U.S. 24 (1966), is beside the point. In any event, it is factually inapposite. The report found that the movement of the thalweg in the Mississippi River had been by accretion. That finding was made on the determination that the channel had moved gradually, as well as on the finding that the movement of the channel in the bed of a river does not constitute an avulsion. Moreover, this Court's per curiam affirmance, without discussion, did not establish the correctness of the master's conclusion that no avulsion could have occurred even if the change in the channel had been sudden.

ownership of a submerged river bed where there is a shift of the thalweg within a fixed bed.

The court of appeals did, however, correctly apply Nebraska's island rule. As stated in *Valder* v. *Wallis*, 196 Neb. 222, 225, 242 N.W. 2d 112, 114 (1976), quoting from *State* v. *Ecklund*, 147 Neb. 508, 23 N.W. 2d 782 (1946) (emphasis added):[8]

> Where a river changes its main channel, *not by slowly excavating and gradually passing over the intervening space to a new position, but changes it by flowing around intervening land*, as by gradually, during many years, deepening a smaller channel which was on the other side of an island until it becomes the main channel, the boundary which was fixed as the original main channel remains, under such conditions, in that original channel.

That is in essence what respondents contend occurred in the present case. As chutes were formed across the peninsula, islands were formed between the chutes and the river gradually diverted from the old main channel through the chutes, although the change probably occurred much faster than in the typical "island rule" case.[9]

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[8] *Ecklund, supra*, 147 Neb. at 521, 23 N.W. 2d at 789, in turn quotes from the Eighth Circuit's decision *Commissioners of Land Office of State of Oklahoma* v. *United States*, 270 F. 110, 113 (1920).

[9] Barrett's field notes (Tribe Exh. 26E) stated in part in reference to the peninsula:

> Until very recently, appearances indicated that this point was increasing in size from the deposits and drift of the river; but, during the present season, the river, rising to a great height, partly worked a channel across it, which may, eventually, entirely detach it from the Nebraska shore, rendering it an island in the river.

Under respondents' view of the facts, the avulsion probably occurred at a time of high water. At that time, some of the intervening land may have been covered for a time. But if the land maintained its character and was not eroded away, the principle of *Valder* v. *Willis* would govern and title to the land would remain in the Tribe. When the water level settled to normal levels, the land would reemerge intact.

The State of Iowa (79-1779 Pet. 13) and Wilson (79-1741 Pet. 21-22) insist that the present case involves no more than the shifting of sandbars within the bed of the Missouri River. That is mere speculation. Admittedly, the eastern point of the Barrett peninsula was a relatively low, sandy point. See Barrett's field notes (Tribe Exh. 26E). But the peninsula was not so low as to be part of the bed of the river. Barrett thought that the point might eventually be separated from the mainland and become an island (see note 9, *supra*). Moreover, the peninsula was not insubstantial. According to Barrett's sketch, it was more than a mile wide. Nor are the "bars" shown on the 1879 map merely shifting mounds of sand (see Plate II, 575 F. 2d at 626). At a time when much of the surrounding fast land was innundated, they appeared as distinct land forms (see *id.* at 642). In fact, other land, shown as submerged on the 1879 map, may well have reemerged when the water receded to normal. As the court of appeals stated (*ibid.*), inferences drawn from the land forms drawn on the 1879 map are conjectural in view of the concededly very high state of the water when it was drawn.

3. In light of the presumption applicable under 25 U.S.C. 194, the court of appeals held (A. 46-47) that the finding by the district court, made after a bench trial and in reliance mainly on old records and maps, that the river moved by accretion was clearly erroneous even if

"identifiable land in place" is a sine qua non of avulsion. Wilson (79-1741 Pet. 32-35) and RGP (79-1744 Pet. 8-10) contend that the district court's finding was not clearly erroneous. In its first opinion the court of appeals examined in great detail the available maps, documentary evidence, and expert testimony and carefully explained the way in which the district court had erred. See 575 F. 2d at 639-651. In essence, the court found that the district court had resolved each doubt and uncertainty in favor of accretion (See A. 35). This was erroneous because the private petitioners—not the Tribe—had the burden of proof under 25 U.S.C. 194. In light of the thorough and careful analysis of the court of appeals, on which we rely, there is no need for this Court to retrace and resift the facts of this case.[10]

4. RGP (79-1744 Pet. 6-7) contends that the presumption of 25 U.S.C. 194 offends *Tot* v. *United States*, 319 U.S. 463 (1943), because (i) it is not rational to presume continuity of Indian ownership for 100 years or more and

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[10]The court of appeals spent nearly a year from the date this case was submitted to the date of decision of its first opinion. It carefully reviewed a great deal of testimony and concluded that the petitioners had not been able to show that the river moved by accretion. While in our view respondents' factual case is convincing, nonetheless, there is little direct evidence of how the river moved. The 1867 Barrett map shows a peninsula extending eastward into the river. The only other documentary evidence of how the river after 1867 and prior to 1880 appeared was an 1875 map of Monona County, Iowa (A. 51) and the 1879 Missouri River Commission map (Plate II, 575 F. 2d at 626). The Iowa map did not purport to map the Nebraska side of the river and the 1879 map was done at a period of very high water. No other maps in that period were submitted. The precise movement of the river in that period is unknown. See 575 F. 2d at 639-646.

From 1912 to 1923, the evidence of accretion is similarly inclusive. Again there were few maps, and the available historical evidence did not provide a basis for determining that the river moved by accretion. Nor was the scientific evidence particularly helpful to petitioners' case. See 575 F. 2d at 647-650.

(ii) petitioners have had no fair opportunity to rebut the presumption. This is not so. It is entirely rational to presume that the Tribe has owned the disputed land for more than a century in light of the undisputed fact that the Tribe, with the possible exception of some allotments, never conveyed the property. Moreover, petitioners have had a fair opportunity to rebut the presumption, just as Section 194 requires. At the trial, petitioners were on notice that the Tribe and the United States contended that the presumption of Section 194 was applicable. Petitioners were in no way prevented from submitting all the proof they desired to demonstrate that accretion had occurred. Petitioners have thus had a fair opportunity to rebut the presumption.

RGP (79-1744 Pet. 8-9) and Wilson (79-1741 Pet. 30-31) contend that the court of appeals placed too stringent a burden of proof on petitioners and that Section 194 does not require petitioners to prove accretion beyond "any possibility of a doubt" (*ibid.*). This misstates the holding of the court of appeals. The court held that the available historical evidence was fully consistent with avulsion and that petitioners' theory, based on the same evidence, that accretion had occurred, was simply speculation. This did not require absolute proof of accretion, but it did require petitioners to present substantial evidence inconsistent with avulsion or a theory of accretion not dependent entirely on guesswork.[11]

5. Wilson (79-1741 Pet. 39-41), RGP (79-1744 Pet. 6-18) and Dahl (Br. 6-9) contend 25 U.S.C. 194 is

[11]Although this Court "noted" in *Wilson* (442 U.S. at 678) that the district court had found that petitioners had carried the burden of proving title by a preponderance of the evidence, this Court itself did not so hold. This Court did not reach the issue whether the court of appeals, after carefully evaluating the evidence, had properly held that petitioners' evidence was insufficient to establish accretion.

unconstitutional because it establishes an invidious racial discrimination. In granting certiorari in *Wilson*, the Court previously declined to review that issue. There is no reason for the Court do so now.

As this Court stated in *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), the resolution of petitioners' due process claim must turn "on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian ward' status, to legislate on behalf of federally recognized Indian tribes." The Court there concluded that Congress' judgment in adopting "legislation that singles out Indians for particular and special treatment" will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 554-555. In *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted), the Court reaffirmed this analysis, holding that—

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the United States' special obligation toward its Indian wards by protecting their most valuable property, their lands. In order to safeguard this vital asset against questionable claims, Section 194 provides that a non-

Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

## CONCLUSION

The petitions for a writ if certiorari should be denied.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1979

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*Petitioners,*

R. G. P. INCORPORATED, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Respondents (Petitioners on separate petitions),*

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

*Respondents.*

## BRIEF OF PETITIONERS IN REPLY TO BRIEF OF THE OMAHA INDIAN TRIBE IN OPPOSITION TO PETITION FOR CERTIORARI

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## BRIEF OF PETITIONERS IN REPLY TO BRIEF OF THE OMAHA INDIAN TRIBE IN OPPOSITION TO PETITION FOR CERTIORARI

There is little in the brief of the Omaha Tribe which calls for a reply brief. But the Tribe's brief contains some statements which may be misleading and which we would like to correct or clarify.

### I.

In the Tribe's brief (page 5), the 2900 acres herein involved is called the Blackbird Bend area. Heretofore in this litigation the 2900 acres has been referred to as the Barrett Survey area. It is bounded on the north,

east and south by the Barrett 1867 meander of the Nebraska shore, and on the west by the 1943 Iowa-Nebraska Compact Boundary Line. It is part of the larger area which has been called the Blackbird Bend area, and which is bounded on the north, east and south by the Iowa high bank, and on the west by the present Missouri River.

II.

On Pages 15, 45 and 46 of his brief, counsel for the Tribe refers to the order of "the trial court" of June 15, 1975, maintaining the Omaha Indian Tribe in possession of the Barrett Survey area, which it had seized by force of arms on April 1, 1975. This was an order by the Honorable Edward J. McManus, District Judge, entered after a fifteen minute hearing. Judge McManus relied on a representation by the Bureau of Indian Affairs in the form of a February 3, 1975 opinion of the Solicitor of the Department of Interior that the United States Engineers' Program in the 1940's for rechannelization of the river had the effect of cutting off the Blackbird Bend ox-bow from the Omaha Reservation in the 1940's so that it became part of the eastern bank of the Missouri River for the first time. Actually, the land in question had been on the Iowa side of the river long before the United States Engineers started their work in the area, which was in 1936. The Bureau of Indian Affairs was well aware of that from reports filed with that Bureau by its investigators, Clark and Robinson, in September of 1974, reflecting their investigations which they started in June of 1973. Nevertheless, counsel for the Tribe now seeks some support from the injunction of June 5, 1975.

Judge McManus's suggestion that the omission of the Barrett Survey area from the Monona County, Iowa, tax rolls may have indicated that the County Assessor may have been unsure as to whether the Tribe was owner, was adopted from that February 3, 1975 opinion of the Solicitor of the Department of Interior. However, at the trial, the delay in getting that land on the tax rolls of Monona County was explained by a May 7, 1958 resolution of the Monona County Board of Review (which supervises the County Assessor) "not to add any bar land along the Missouri River on the current tax books until the river is stabilized by the government engineers and proper survey is submitted to the Assessor's office by the proper officials." This applied to all accretion land in Monona County, not just to the Barrett Survey land (Ex. A3, R1801, 1802). The survey was eventually ordered and made, and the land assessed and taxed to the defendants or their predecessors in title.

With regard to the June 5, 1975 order of Judge McManus, see the brief of *Wilson, et al.*, in No. 78-160, pages 8 and 9. Judge McManus did not try the case. He handled preliminary matters. Judge Bogue tried the suit.

III.

At Page 38 of his brief, counsel for the Tribe takes exception to the statement in the *Wilson, et al.* Petition for Certiorari that:

> "The Court of Appeals concedes that there was no identifiable fast land (bank or island) or even *identifiable* riverbed (shore or sandbar) left in place as the thalweg in the Blackbird Bend moved west be-

> tween 1867 and 1879, or as it moved south from the north high bank between 1906 and 1923 or 1927."

That statement was made at the beginning of the Summary of the Argument on Page 12 of the Petition. We reaffirm that statement. It is supported by excerpts from the opinion of the Court of Appeals printed at Page 29 of said Petition for Certiorari. What the Court of Appeals is saying in effect is that a sandbar in a certain location after a high water period cannot be identified as the same sandbar that may have been located in the same area before it was submerged. So that Court's theory is: It can't be identified so it doesn't have to be identified. The Nebraska Supreme Court does not agree.

IV.

On Page 39 of his brief, counsel for the Tribe refers to the 1879 map as reflecting a survey made with the river at flood stage. The Court of Appeals said it was at flood stage, but the Court of Appeals was mistaken. The map (Appendix to Wilson's present Petition for Certiorari, Page 52, bears the surveyor's notation "stage —high water". That would mean ordinary high water, not flood stage. And ordinary high water in 1879 would be lower than in 1867 because the thalweg had been shortened by about three miles. That steepens the slope of the channel, increases the scour, deepens the channel and lowers the water level.[1] Such lowering of the water level would expose more bars and shore than would pre-

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1 See *Lieneman v. Sarpy County*, 145 Neb. 382, 16 N. W. 2d 724, 730 (1944) quoting a U. S. Engineers report of January 28, 1880.

viously have been exposed with the same river flow. Lowering the ordinary high water mark increases the land area above it. This is called reliction and the same property rules apply as in the case of accretion.[2]

In the *Wilson* reply brief in No. 78-160 on Pages 17 to 20, there is a more extensive discussion of the 1879 map, to which we invite attention.

Respectfully submitted,

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2 See *Burket v. Krimlofski*, 167 Neb. 45, 91 N. W. 2d 57, 60, 61 (1958).

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1979

No. 79-1741

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON,

*Petitioners,*

No. 79-1744

RGP, INC., OTIS PETERSON, AND TRAVELERS INSURANCE COMPANY,

*Petitioners,*

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

*Respondents.*

**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## SUPPLEMENTAL BRIEF OF THE ABOVE-NAMED PETITIONERS

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**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## SUPPLEMENTAL BRIEF OF THE ABOVE-NAMED PETITIONERS

Pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, the Petitioners in the above-captioned case file this supplemental brief calling attention to an intervening matter not existing at the time of these Petitioners' last filing.

Of significance on the point that the constitutionality of 25 U. S. C. § 194 is "an important question of federal law which has not been, but should be, settled by this Court[1], is the filing on July 18, 1980 of a Complaint in the

[1] The importance of this question is best shown in the American Land Title Association amicus brief, pp. 2-6. See also

(Continued on the next page)

United States District Court for the District of South Dakota, Western District, Civil No. 80-5062, the Oglala Sioux Tribe of the Pine Ridge Indian Reservation, plaintiff, vs. The United States of America, et al., defendants. It asks that the title to the Black Hills (about 10,000 square miles, about 7,000,000 acres[2]) be quieted in the Oglala Tribe; that $10,000,000,000 in damages be awarded the Tribe from the individual defendants and that $1,000,000,000 in damages be awarded the Tribe from the United States. It invokes 25 U. S. C. § 194 to shift the burden of proof to the defendants. The Oglala Tribe asserts that it was not represented nor was a party in the case of *United States, Petitioner, vs. Sioux Nation of Indians,* No. 79-639 in this Court (decided June 30, 1980; 48 Law Week 4960), and is not bound by any of the stipulations or the decision in that case.

The defendants in the case are the United States, the Secretary of the Interior, the Secretary of Agriculture, the State of South Dakota, seven counties, nine municipalities, forty-four individuals, and twenty-nine corporations "on their own behalf and as representatives for all other persons and corporate entities similarly situated."

In the allotted space we cannot reproduce the entire Complaint. Some excerpts follow:

> 28. In *United States v. Sioux Nation of Indians,* — U. S. — (1980), an action for money compensation only, the United States Supreme Court found sub-

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(Continued from previous page)

the amicus brief of Gordon Dahl and 81 Other Farm Owners in Monona County, pp. 8, 9.

[2] Exhibit "A", plat attached to said complaint, showing area claimed, is reproduced at the end of this brief.

stantially all of the facts alleged in paragraphs 16 through 23. As a party to that action, the United States is estopped to deny these facts.

29. *United States v. Sioux Nation of Indians, supra,* involved trial *de novo* of certain claims for money compensation formerly before the Indian Claims Commission, and was specially authorized by P. L. 95-243, 92 Stat. 153 (1978). The Oglala Sioux Tribe allowed its contract of retainer with Indian claims counsel to expire in May of 1977, and was neither represented nor a party in the *Sioux Nation* proceedings, having expressed its intention to seek instead actual possession and ownership of the disputed territory. Former counsel nevertheless purported to continue to act as legal representative for the Oglala Sioux Tribe before the Court of Claims and the United States Supreme Court, making claims and concessions without authority. The United States is estopped from denying that counsel was not acting properly on behalf of the Oglala Sioux Tribe because, in accordance with the terms of the Indian Reorganization Act of 1934, 25 U. S. C. § 476, the Indian Claims Commission Act of 1946, 25 U. S. C. § 70n, and Article IV of the Oglala Sioux Tribal Constitution, no contract for legal representation of the Oglala Sioux Tribe in this matter could have been lawful or effective without the prior approval of the Secretary of the Interior. The Secretary last approved such a contract in May of 1967, which contract expired in May of 1977.

30. Counsel for those Sioux tribes that were parties to *United States v. Sioux Nation of Indians* stipulated that the United States' entry, occupation, and possession of the land described in paragraph 16 had constituted a lawful exercise of the United States' power of eminent domain under the Fifth Amendment. The United States Supreme Court expressly reserved the issue of the Constitutionality of the United States' action. Since it was not represented nor was a party in that proceeding, the Oglala Sioux

Tribe is not bound by stipulations of counsel nor limited to a prayer for just compensation, and *Sioux Nation* does not and cannot bar the present action.

• • •

44. As its final claim for relief against the federal defendants, the State of South Dakota and its political subdivisions, and the individually named defendants, plaintiff alleges that it is entitled to shift the burden of proof as to right, title and ownership of the territory described in paragraph 16 because:

A. Shifting the burden of proof is required by 25 U. S. C. § 194, in that this action involves a "trial about the right of property in which an Indian may be a party on one side, and a white person on the other."

WHEREFORE, plaintiff prays that this court:

1. Quiet the title of the Oglala Sioux Tribe to the territory described in paragraph 16, restoring to the Oglala Sioux Tribe absolute undisturbed dominion, use and possession of the same;

2. Declare that the right of the Oglala Sioux Tribe to hunt within and beyond the limits of said territory continues undiminished.

3. Enjoin the United States from removing, or permitting others to remove minerals, timber, and other resources from said territory, and from committing any waste thereon;

4. Enjoin the State of South Dakota, its political subdivisions, and the individually named defendants from removing, or permitting others to remove minerals, timber, and other resources from said territory, and from committing any waste thereon;

5. Enjoin the United States, and in particular, defendants Andrus and Bergland, from further interfering with Oglala Sioux use of said territory for subsistence and religious purposes;

6. Award plaintiff damages against the individually named defendants in the amount of ten billion dollars ($10,000,000,000.) for trespass and waste;

7. Award plaintiff damages against the United States in the amount of one billion dollars ($1,000,000,000.)) for hardship and suffering caused by denying plaintiff access to and use of said territory;

8. Shift the burden of proof of right and title to the defendants; and

9. Such other relief as this court may deem just and proper.

Dated this 18th day of July, 1980.

We submit that the filing of this suit by the Oglala Sioux Tribe demonstrates that Section 194 will be an important factor in Indian litigation. We have no up-to-date information on the subject, but there would seem to be every reason to believe that in many of the cases listed on Page 3 of the American Land Title Association amicus brief, the pleadings have been amended to invoke Section 194. With Section 194 involved in so much important litigation, the question of whether or not it is constitutional should be settled by this Court at the earliest opportunity.

Respectfully submitted,

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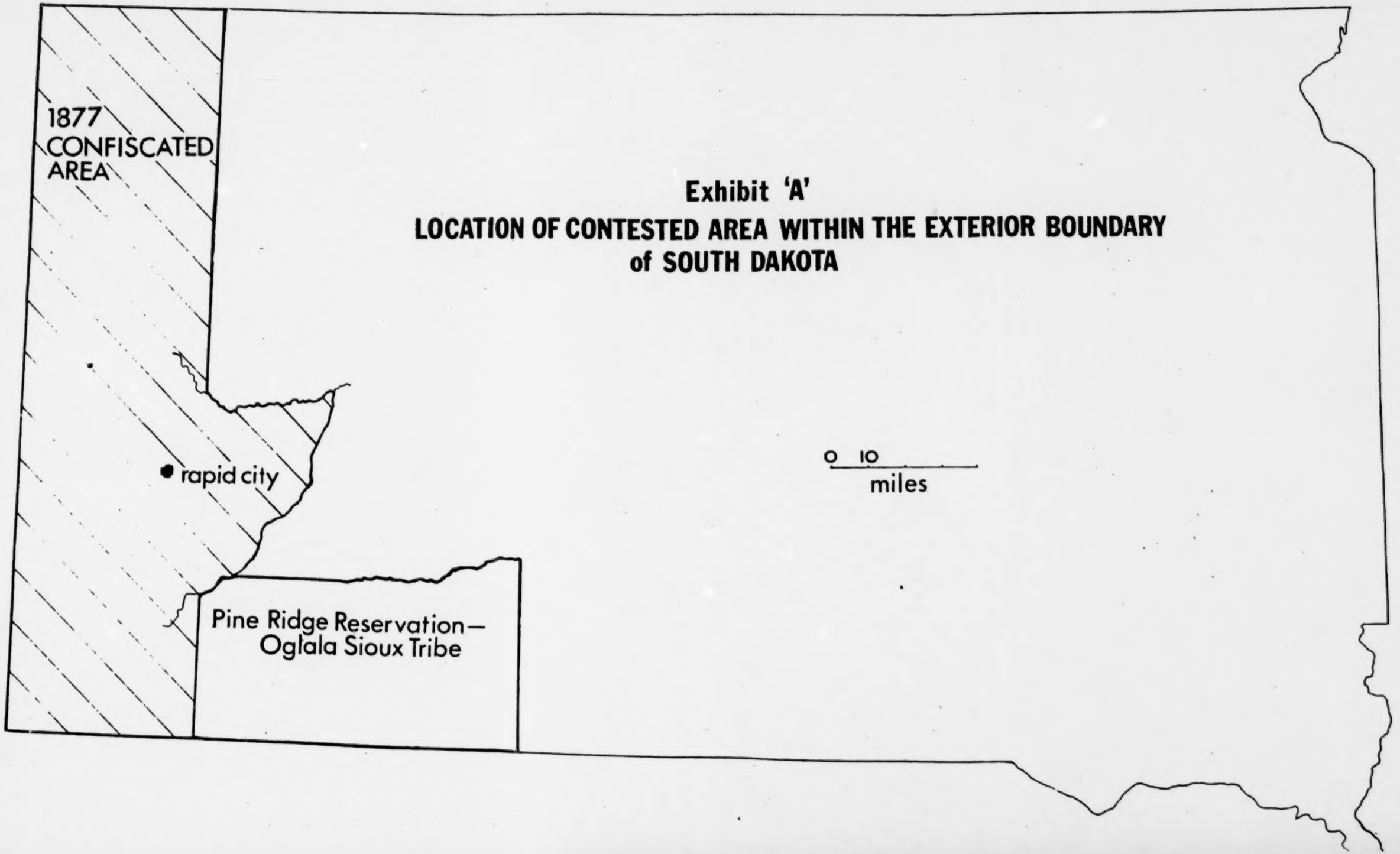
# Exhibit 'A'

## LOCATION OF CONTESTED AREA WITHIN THE EXTERIOR BOUNDARY of SOUTH DAKOTA



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OCTOBER TERM, 1979

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ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON,
*Petitioners,*

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*Petitioners,*

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,
*Respondents.*

---

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## REPLY BRIEF FOR THE OMAHA INDIAN TRIBE IN OPPOSITION TO THE SUPPLEMENTAL BRIEF

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"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." ..... 2

IN THE

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

---

## REPLY BRIEF FOR THE OMAHA INDIAN TRIBE IN OPPOSITION TO THE SUPPLEMENTAL BRIEF

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## BACKGROUND

The Court rendered its June 20, 1979 Opinion in the case of *Wilson* v. *Omaha*.[1] It reviewed in detail the background, legislative history objective and applicability of 25 U.S.C. 194.[2] The Court declared 25 U.S.C. 194 applicable to the facts which were before it. However, the Court remanded the case to the United States Court of Appeals for a single, limited issue: Had the trial court correctly applied the laws of Nebraska to the facts of the case? [3]

The Court of Appeals rendered its January 15, 1980 Opinion in compliance with the Court's remand.[4] After an exhaustive review of the laws of the State of Nebraska, the appellate court declared that the trial court had failed properly to apply the laws of that State.

From the last-cited opinion, Petitioners again seek certiorari from the Court. For the second time, Petitioners seek, among other things, to have the Court declare 25 U.S.C. 194 unconstitutional.[5]

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[1] 442 U.S. 653 (1979).

[2] 25 U.S.C. 194.

"Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." R.S. § 2126. Derivation: Act of June 30, 1834, c. 161, § 22, 4 Stat. 733.

[3] 442 U.S. 653, 679 (1979).

[4] Omaha v. Wilson, 614 F.2d 1153 (CA 8, 1980).

[5] Earlier requests by the Petitioners respecting the constitutionality of 25 U.S.C. 194 are presented at Pet. Wilson,

On June 30, 1980, the Court rendered its Opinion in *United States* v. *Sioux Nation of Indians*, No. 79-639. Thereafter, on July 18, 1980, the Oglala Sioux initiated a quiet title proceeding in the United States District Court for the District of South Dakota, Western Division. The Sioux Tribe asserts title to the Black Hills in that proceeding. Among many others, the Tribe named the United States as one of the defendants. It charges the United States with extensive wrongdoing. The Oglala Tribe asserts that 25 U.S.C. 194 is applicable to its case.

Petitioners have here filed their "Supplemental Brief," to which this brief is in reply. Petitioners assert that the Oglala Sioux proceeding to recover the Black Hills comes within the purview of Rule 22.6 of the Rules of the Supreme Court.[6]

In their "Supplemental Brief," Petitioners, among other things, assert that:

> ". . . whether or not it [25 U.S.C. 194] is constitutional should be settled by this Court at the earliest moment."[7]

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et al., No. 78-160, p. 4, Question 1; Pet. RGP, Inc., et al., No. 78-162, p. 2, Question Presented For Review. Petitioners RGP, Inc., et al., presented a single question: Whether 25 U.S.C. 194, on it face and as construed, constitutes invidious racial discrimination against Petitioners.

[6] Rule 22.6:

> "Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

[7] Petitioners' Supplemental Brief, Nos. 79-1741 & 79-1744.

It is the view of the Omaha Tribe that the Court implicitly—if not explicitly—upheld the constitutionality of 25 U.S.C. 194 and applied it with specificity to the facts in the case of *Wilson* v. *Omaha.*[8] Petitioners here are, in effect, seeking a rehearing respecting a decision of the Court in *Wilson* v. *Omaha.*

## REPLY MADE TO THE "SUPPLEMENTAL BRIEF" FILED BY PETITIONERS IN SUPPORT OF THEIR SECOND EFFORT TO OBTAIN A WRIT OF CERTIORARI IN THESE CASES

### FACTS

In their second petition for certiorari, as in the original petition,[9] Petitioners seek to have the Court determine the constitutionality of 25 U.S.C. 194.[10]

Reason for the "Supplemental Brief," as asserted by Petitioners, is that there was filed July 18, 1980, in the United States District Court for the District of South Dakota, Western Division, by the Oglala Sioux an action to quiet title to lands claimed by the Sioux Tribe. There is only remote relationship between these cases and the Oglala Sioux case—both involve Indians and both involve title to lands. In the Black Hills action, the Oglala Sioux Tribe is asserting primarily that the United States wrongfully seized and took possession of the Black Hills. Here, the United States is in no sense involved as a defendant. The Omaha Indian Tribe charged and proved that the Petitioners are squatters and that the Peti-

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[8] 442 U.S. 653 (1979).

[9] Wilson v. Omaha, No. 79-1741; RGP, Inc. v. Omaha, No. 79-1744; Brief for Omaha Indian Tribe in Opposition.

[10] "Supplemental Brief of the Above-Named Petitioners," p. 5.

tioners had the burden of proving their title. Petitioners failed.

### A. Petitioners Are "Squatters" On Indian Lands

Petitioners claim title to the 2900 acres of Omaha land here involved. They do not have patents to those lands. They do not deraign title to the lands in question from patentees of the United States.

Petitioners admit title to the land originally was in the Omaha Indian Tribe. They likewise admit long occupancy and possession by the Tribe of the lands in question. Petitioners nevertheless urge that the 2900 acres, title to which is the subject matter or res of *Wilson* v. *Omaha*,[11] were (a) totally and completely washed away by the Missouri River; and (b) totally and completely replaced by accretions to lands allegedly owned by a predecessor "squatter" of Petitioners.

### B. Opinions Of The Court Of Appeals

The Court of Appeals for the Eighth Circuit declared that 25 U.S.C. 194 was an appropriate exercise by Congress of its powers in regard to Indian Affairs.[12] The appellate court repeatedly and specifically held that Petitioners had failed to sustain their burden of proving the 2900 acres were totally washed away and completely replaced by accretions to the squatter predecessor in title of the Petitioners.[13]

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[11] 442 U.S. 653 (1979).

[12] See, Nos. 79-1741 & 79-1744, Brief for Omaha Indian Tribe in Opposition.

[13] *Ibid.*

### C. Affirmance By The Court Of The Opinion Of The Court Of Appeals As To The Applicability Of 25 U.S.C. 194

It is correctly stated by the Court of Appeals, respecting the Court's Opinion in *Wilson* v. *Omaha*, that:

> "Generally, the Court sustained our holding that 25 U.S.C. § 194 was applicable [to Petitioners here] and placed both the burden [a] of going forward with the evidence and [b] of persuasion upon defendants [Petitioners here]." [14]

The Court upheld, it is believed, the constitutionality of 25 U.S.C. 194 in its *Wilson* v. *Omaha Indian Tribe* decision.[15] On the subject, the Court stated:

> "There seems to be no question here that the area within the Barrett survey . . . was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854." [16]

That proof by the Omaha Indian Tribe of long occupancy of the lands here involved within the Omaha Indian Reservation was, said the Court, sufficient ". . . to bring § 194 into play." [17]

With the Omaha Indian Tribe having made out its prima facie case, the Court said this:

> ". . . we are in agreement with the two courts below that § 194 contemplates the non-Indian shouldering the burden of persuasion as well as the burden of

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[14] Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[15] App. to Pet. Wilson, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[16] *Ibid.*

[17] *Ibid.*

> producing evidence once the tribe has made out its prima facie case of prior title or possession." [18]

It is respectfully submitted that implicitly and, indeed, explicitly, the Court sustained the constitutionality of 25 U.S.C. 194.

**APPLICABILITY OF 25 U.S.C. 194 TO "SQUATTERS"**

Here, there is involved the issue of whether "squatters" on Indian lands have the burden of proving their title after the Omaha Indian Tribe made out its prima facie case.

It is important here that the Court's interpretation and application of 25 U.S.C. 194, as set forth above, stemmed from its analysis of (a) the legislative history of 25 U.S.C. 194; (b) the explicit language of 25 U.S.C. 194; and (c) the congressional objective of 25 U.S.C. 194. Predicated upon that analysis, the Court made this explicit determination as to the intention of Congress when it enacted the provision in question:

> "It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made *by non-Indian squatters on their land.*" [19]

With reference to the exemption of the states from the application of 25 U.S.C. 194, the Court said this:

> "Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these acts as they developed was to protect the rights of Indians to their properties." [20]

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[18] *Ibid.*

[19] *Ibid.*, at p. 665. [Emphasis supplied].

[20] *Ibid.*, at p. 664.

To accomplish the congressional objectives set forth above, the Court said the Acts, which were companion to 25 U.S.C. 194, are as follows:

> "Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions." [21]

As part of the Court's analysis of 25 U.S.C. 194—its congressional history and congressional objectives—the Court cited key decisions, all of which sustained the congressional power to enact legislation complementing or paralleling the objectives of 25 U.S.C. 194.[22]

The Court's in-depth review of the background of 25 U.S.C. 194 and its explicit rulings in *Wilson* v. *Omaha* demonstrate that 25 U.S.C. 194 has already withstood the challenges as to its constitutionality.

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[21] *Ibid.* See, 25 U.S.C. 180, "Settling on or surveying lands belonging to Indians by treaty

> "Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian any of the boundaries by marking trees, or otherwise, is liable to tribe, or surveys or attempts to survey such lands, or to designate a penalty of $1,000. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands." R.S. § 2118. Derivation: Act of June 30, 1834, c. 161, § 11, 4 Stat. 730.

[22] See, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667, 669 (1974); Bryan v. Itasca County, 426 U.S. 373, 392 (1976). See, also, Morton v. Mancari, 417 U.S. 535, 547 (1974); Antoine v. Washington, 420 U.S. 194, 199 (1975).

## DEFERENCE BY THE COURT TO LEGISLATIVE BRANCH

In the Court's June 30, 1980 decision in *United States* v. *Sioux Nation of Indians*, there were reviewed in detail the concepts of the separation of power under the Constitution—the Judiciary vis-a-vis the Legislative.[23] The Court stated:

> ". . . this Court's precedents, leads us to conclude that neither of the two separation of powers objections described above is presented by this legislation." [24]

Precisely the same deference to the constitutional powers of Congress over Indian affairs has been accorded to the Legislature by the Court in the case of *Wilson* v. *Omaha*. Repeatedly, the Court has declared that it will decide constitutional issues only if strict necessity compels it to do so.[25] Quite obviously, in these cases, the Court found no predicate for declaring 25 U.S.C. 194 unconstitutional. Rather, the Court sustained 25 U.S.C. 194 and effectively applied it.

## CONCLUSION

The fact that 25 U.S.C. 194 and the Court's decision in *Wilson* v. *Omaha* are being cited in on-going cases does not warrant the Petitioners raising anew the issue of the constitutionality of that Act. The Omaha Indian Tribe respectfully requests the Court to deny the pend-

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[23] United States v. Sioux Nation of Indians, Slip Opinion, June 30, 1980, p. 19.

[24] *Ibid.*, at p. 23.

[25] See, Nos. 79-1741 & 79-1744, Brief for Omaha Indian Tribe in Opposition, p. 48.

ing petitions for certiorari. It is believed the denial would be in complete conformity with the Court's decision of June 20, 1979, in *Wilson* v. *Omaha Indian Tribe.*

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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**Nos. 79-1741, 79-1744**

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ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON, R.G.P. INCORPORATED, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,
*Petitioners,*

VS.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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### OPINIONS BELOW AND OF THIS COURT

The following opinions of courts in this case have been rendered:

The original memorandum opinion of the District Court for the Northern District of Iowa, together with

its findings of fact and conclusions of law, is reported at 433 F. Supp. 57 and 67 (N.D. Iowa 1977). The initial opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

The opinion of this Court, dated June 20, 1979, upon certiorari to the Eighth Circuit (No. 78-160 and 78-161) is reported at 442 U.S. 653 (1979).

The opinion of the Court of Appeals of the Eighth Circuit dated January 15, 1980 on remand from this Court, is reported at 614 F.2d 1153 (8th Cir. 1980).

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

25 U.S.C. § 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

## QUESTION PRESENTED

Whether 25 U.S.C. § 194 is unconstitutional because it automatically assigns the burden of proof on a racial basis in violation of the Fifth Amendment and because it seriously impinges upon the fundamental due process right to effectively engage in the litigation process.

## INTEREST OF THE AMICUS CURIAE AND REASONS FOR GRANTING THE WRIT [1]

There is presently pending in numerous federal courts extensive Indian claims litigation for the recovery of

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[1] Attorneys for all of the parties herein have given written consent to the filing of this amicus brief. Copies of the consents have been submitted to the Court with this brief.

land and for trespass or other damages for the wrongful possession of the land.[2] These cases seek the return of vast amounts of real property and monetary damages from present owners upon the basis that past acquisitions of Indian tribal land by the defendants or their prede-

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[2] A partial list of cases includes: United States v. Maine, Civ. No. 1966-ND (D. Me.); Western Pequot Tribe v. Holdridge Enterprises, Inc., Civ. No. H-76-193 (D. Conn.); Schaghticoke Tribe v. Kent School Corp., Civ. Action No. H-75-125 (D. Conn.); Mohegan Tribe v. Connecticut, Civ. No. H-77-434 (D. Conn.); Chitimacha Tribe v. Harry L. Laws Co., Inc., Civ. No. 77-0772-L (W.D. La.) (notice of appeal filed April 25, 1980); The Oneida Indian Nation of New York v. County of Oneida, 70-CV-35, 74-CV-187 (N.D.N.Y.); The Oneida Indian Nation of New York v. New York State Thruway Authority, 78-CV-104 (N.D.N.Y.); Seminole Tribe of Florida v. Florida, No. 78-6116-CIV (S.D. Fla.); Chitimacha Tribe v. Smith, Civ. Action No. 79-0493-L (W.D. La.); Chitimacha Tribe v. A. Wilbert Son's Lumber & Shingle Co., Civ. Action No. 79-184 (W.D. La.); Pechanga Band of Mission Indians v. Kacor Realty, Inc., Civ. Action No. 78-4499-MML-GX (C.D. Calif.); Dennison v. Topeka Chambers Ind. Dev. Corp., Civ. Action No. 79-1668 (D. Ks.); The Oneida Indian Tribe of Wisconsin v. New York, 79-CV-798 (N.D.N.Y.); Chitimacha Tribe v. Laws, Civ. Action No. 80-0637 (W.D. La.); Chitimacha Tribe v. Ensminger, Civ. Action No. 80-0638 (W.D. La.). In addition to these and numerous other pending cases, the United States, through the Department of Interior, recommended this year that the applicable statute of limitations for the commencement of Indian damage claims by the United States, 28 U.S.C. § 2415, be extended. In connection with this legislation, the Department of Interior reported that it now is processing some 9,768 Indian claims and stated that more than 5,000 additional, identifiable claims may not yet be inventoried. S. Rep. No. 96-569, 96th Cong., 2d Sess. p. 8 (1980). Undoubtedly many of these claims may arise in situations where Section 194, as previously construed by the Court, would be applicable.

cessors in interest were invalid and of no effect. This litigation has been instituted in virtually every instance by either the United States, as trustee, or by the Indian tribes themselves, or both.[3]

The statute at issue herein, 25 U.S.C. § 194, purporting to govern the allocation of the burden of proof in Indian claims litigation "about the right of property" had never been applied in any reported case prior to the initial opinion of the Eighth Circuit herein from the time of the enactment in its original form some one hundred and fifty-eight years ago.[4] However, since that time and this Court's subsequent interpretation of the statute, it has been repeatedly invoked in support of this kind of litigation.[5] As these claims continue to multi-

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[3] Among the more substantial of the claims for land and damages asserted in the pending cases are United States v. Maine, *supra*, approximately 12.5 million acres and an estimated $25 billion in trespass damages; Chitimacha Tribe v. Harry L. Laws Co., Inc., *supra*, several thousand acres of land and $100 million in damages; The Oneida Indian Nation of New York v. County of Oneida, *supra*, approximately one hundred thousand acres; Dennison v. Topeka Chambers Ind. Corp., *supra*, 23 one-square-mile tracts valued at approximately $100 million; and, The Oneida Indian Tribe of Wisconsin v. New York, *supra*, approximately five million acres.

[4] The opinion of the Court of Appeals notes that two previous cases had cited Section 194 but that "neither case expounds upon the effect this section should be given." 575 F.2d at 631 n.19. United States v. Sands, 94 F.2d 156 (10th Cir. 1938); Felix v. Patrick, 36 F. 457 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892). This Court also recognized that prior to the instant case the statute had been "seldom used" and "dormant." 442 U.S. at 658, 667.

[5] *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 588-89 (1st Cir.), *cert. denied*, 100 S.Ct. 138 (1979); Chitimacha Tribe v. Harry L. Laws Co., Inc., *supra*; Chiti-

ply,[6] it may not be doubted that reliance upon this statute will continue.

As this Court previously noted, Section 194 "operates *regardless of the circumstances* once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute." 442 U.S. at 668 (emphasis supplied). Inasmuch as the events complained of in Indian land claims litigation occurred in the distant past, in many cases hundreds of years ago, the outcome of the litigation often will rest upon the burden of proof.[7] Thus, the need for this Court's examination of the constitutionality of Section 194 at this time is particularly compelling. Prompt resolution of this question will provide constructive guidance to the many trial and appellate courts presently confronted with this litigation, thereby avoiding unnecessary appeals and re-trials.

The American Land Title Association ("ALTA"), is the national trade association of the land title industry. Its approximately 2,200 members include land title insurers, their agents, abstractors and associate members. The principal function of the land title industry is to

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macha Tribe v. Smith, *supra*; Chitimacha Tribe v. A. Wilbert Son's Lumber & Shingle Co., *supra*; Pechanga Band of Mission Indians v. Kacor Realty, Inc., *supra*; Dennison v. Topeka Chambers Ind. Dev. Corp., *supra*; Chitimacha Tribe v. Laws, *supra*; Chitimacha Tribe v. Ensminger, *supra*.

[6] *Supra*, note 2.

[7] The application of the burden of proof is frequently critical in any case, as this Court has observed:

> Where the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive to the outcome of the litigation . . . .

Lavine v. Milne, 424 U.S. 577, 585 (1976).

facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions.

The belated resuscitation of this statute is of great concern to the ALTA and to all persons relying upon the marketability of land titles. As interpreted by this Court, Section 194 would suddenly erase in this and other similar cases accepted allocations of the burden of proof in actions affecting the titles to real property which have been developed over the years in courts throughout the country. That development of the law has contributed substantially to stable and predictable land transfers which are a necessary prerequisite to the informed judgment of attorneys, abstractors, title insurers, government agencies at various levels and others who must pass daily upon the state of title to real property.

## STATEMENT

This brief is submitted in support of two of the petitions for certiorari from a final judgment remanding this case to the District Court with directions to enter quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Indian Tribe. The relevant facts of this case are set forth in the opinions of this Court, the Court of Appeals and the District Court and are summarized as follows.

On May 19, 1975, the United States, suing as trustee for the Omaha Indian Tribe, brought suit seeking a judgment quieting title in the United States, as trustee, respecting 2,900 acres of land. On May 20, 1975, the very next day, the Omaha Tribe itself filed suit to restrain named landowners from interfering with its peaceful possession and use of the same 2,900 acres and,

subsequently, brought another suit to quiet title.[8] The defendants were several landowners and tenants, a corporate landowner, a corporate mortgagee, the State of Iowa and the State Conservation Commission. It was undisputed that from at least the 1940's until the time of the litigation the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute.[9]

Following a lengthy trial, the District Court reviewed the evidence and, upon extensive findings of fact, entered judgment against the United States, as trustee, and the Omaha Tribe, quieting title in the defendants. 433 F. Supp. at 68-88, 92. The court determined that the Missouri River had changed by reason of the erosion of the tribal land and accretion to the defendants' riparian land to which it was presently attached. *Id.* at 88.

The Court of Appeals reversed, finding that Section 194 controlled and that "the defendants have failed to overcome the presumptive right of possession and title in the Tribe . . . ." 575 F.2d at 623, 631-33. As a result, the Court of Appeals held that the defendants "failed in

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[8] The tribal complaint to quiet title (No. 75-4067) in fact encompassed 11,500 acres, including the 2,900 acres which was the subject of the action instituted by the United States on its behalf. (No. 75-4024). In consolidating all of the cases for trial, the District Court severed and stayed all claims to land beyond the 2,900 acres at issue. 433 F.Supp. at 69.

[9] The District Court found the land at issue to be "now a valuable and productive tract of farm ground, as evidenced by the purchase of 2,180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at $1,685,000, approximately 1780 acres of which is within [the 2,900 acres immediately in dispute]." 433 F.Supp. at 69.

sustaining their burden of proof under § 194." *Id.* at 651.

Last term this Court granted the petition for certiorari filed by the private individual petitioners limiting review to the following two issues:

> (1) Whether the Eighth Circuit erroneously construed 25 U.S.C. § 194 to make it applicable in this case; and
>
> (2) Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.[10]

The Court held that Section 194, by its terms, was applicable to this case. 442 U.S. at 668-69. The Court determined that the term "Indian" as used in the statute applies when an Indian tribe, rather than one or more individual Indians, is the litigant. *Id.* at 665-66. It was also determined that the term "white person" includes artificial entities, such as the corporate petitioners, but not the State of Iowa. *Id.* at 666-68. As review was

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[10] At the same time the Court granted the separate petition for certiorari filed by the State of Iowa and its State Conservation Commission upon the following, similar questions:

> (1) Whether the State of Iowa is a "white person," and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U.S.C. § 194; and
>
> (2) Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.

439 U.S. 963 (1978). A third petition filed by two corporate defendants was granted after the *Wilson* opinion was rendered and that case was remanded to the Eighth Circuit Court of Appeals for further consideration. RGP, Inc. v. Omaha Indian Tribe, 443 U.S. 902 (1979).

limited to the question of the applicability of Section 194 to this case, this Court did not consider the constitutionality of the statute.[11]

As to the second issue, the Court found that the Court of Appeals had properly concluded that federal law governs the substantive aspects of the dispute, 442 U.S. at 669-71, but found that it erred in arriving at a federal standard to determine whether there had been an avulsion or an accretion. *Id.* at 671-79. Rather the Court found that Nebraska law should have been borrowed as the federal rule of decision. *Id.* at 676-78. Because of its view of the controlling law, the Court of Appeals' judgment was vacated and remanded for further proceedings to consider whether the District Court had correctly interpreted Nebraska's law and had properly applied it to the facts in this case.

On remand, the Court of Appeals found that the District Court's interpretation of Nebraska law was incorrect and, in accordance with its prior opinion, held that the parties claiming against the Tribe, except for the State of Iowa, demonstrated only "speculative and conjectural evidence" of their right to quiet title. 614 F.2d at 1155-56. The court further held that those parties failed to sustain their burden of proof under 25 U.S.C. § 194. *Id.* Accordingly, the Eighth Circuit again vacated the judgment of the District Court and remanded the case to that court with directions to enter judgment quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Tribe. 614 F.2d at 1161.

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[11] Each of the petitioners previously asked the Court to review the constitutionality of Section 194. However, in granting review, the Court restricted its consideration of the questions presented in this respect to the proper construction of Section 194.

## SUMMARY OF ARGUMENT

Title 25 U.S.C. § 194 purports to place the burden of proof upon the "white person" in all trials about the right of property in which "an Indian" is a party on one side and "a white person" is on the other, once the Indian establishes a "presumption of title in himself from the fact of previous possession or ownership."

Since this Court has determined that 25 U.S.C. § 194 is applicable to litigation such as this, the Court should now determine whether Section 194 is constitutional. Although the statute had been "dormant" at the time the Court previously decided not to review its constitutionality, it is now commonly at issue in Indian land claims litigation throughout the country.[12] Therefore, the question of its constitutionality is presently of very substantial national interest and importance as its continued application violates individual property rights and encourages unwarranted Indian land claims litigation, thereby impeding the marketability of land titles.

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[12] *See, e.g.*, the cases referred to in note 5, *supra*.

## ARGUMENT

### I. Section 194 is Unconstitutional Because it Assigns the Burden of Proof Upon a Racial Basis.

In all litigation concerning the title to real estate various of the parties, including the defendants, will often bear the burden of proof on various issues. 442 U.S. at 668. However, Section 194 "operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute." *Id.*

The very language of Section 194 should have caused the lower courts to subject the statute to the most rigorous constitutional analysis. Such an analysis would have led to the necessary conclusion that under the variety of tests employed by this Court in evaluating preferential legislation, the automatic assignment of the burden of proof upon a racial basis in Indian land claim cases violates the Fifth Amendment.

One striking aspect of Section 194 is the complete absence of any history of any sort explaining why this specific provision was originally adopted in 1822 as an amendment to the 1802 Indian Trade and Intercourse Act. Nor has there been in the period between that time and the initial opinion of the Eighth Circuit herein any significant administrative or judicial interpretation of the provision.[13] According to Mr. Justice Powell's opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) the very absence of any such indication of the perceived wrong at which the statute was directed

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[13] As noted by the Court in its previous opinion, "[t]he legislative history here is uniformative, and executive interpretation is unhelpful with respect to this dormant statute." 442 U.S. at 667.

makes it impossible for Section 194 to meet "the most exacting scrutiny" [14] which must be applied when preferential classifications based upon race or ethic status are at issue:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations . . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

438 U.S. at 307-09, citing *Teamsters* v. *United States*, 431 U.S. 324, 367-76 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 155-56 (1977); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Here the absence of specific "judicial, legislative, or administrative findings of constitutional or statutory violations" makes it impossible for Section 194 to meet the very threshold of Mr. Justice Powell's analysis.

Since Section 194 does not reflect an articulated legislative purpose,[15] it is impossible to determine whether the non-Indian who must assume thereunder the burden of proof of his ownership of property "regardless of the circumstances" can be certain "that the burden he is asked to bear on that basis is precisely tailored to serve

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[14] 438 U.S. at 300.

[15] *See also*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966).

a compelling governmental interest." 438 U.S. at 299.[16] In the absence of such facts, Section 194 must fail under Mr. Justice Powell's analysis. *See also, In re Griffiths*, 413 U.S. 717, 721-22 (1973); *Loving* v. *Virginia*, 399 U.S. 1, 11 (1967).

Not only does Section 194 fail to meet the basic standard expressed by Mr. Justice Powell in *Bakke*, it also falls short of the constitutional criteria contained in the separate opinion of Justices Brennan, White, Marshall and Blackmun.[17] The Brennan opinion reasserted the principle that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" 438 U.S. at 359. In order to determine whether such an objective existed and was being met, the Brennan opinion states that more than a "rational basis" for the preferential classification must be shown:

> In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. *Instead, to justify such a classification an important and articulated purpose for its use must be shown.*

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[16] In Dunn v. Blumstein, 405 U.S. 330, 343 (1972) the Court held that the equal protection clause requires that all statutes "affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives."

[17] Although that was a joint opinion, for the sake of convenience and to distinguish it from the individual opinions of Justices White, 438 U.S. at 379, Marshall, *Id.* at 387, and Blackmun, *Id.* at 402, it will be referred to hereinafter in this brief as the "Brennan opinion."

*Id.* at 361 (emphasis added). Mr. Justice Brennan then applied this standard and discovered a "sound basis" for the view that the classification in question was properly founded on past and present racial discrimination, *Id.* at 362, and that "there [were] no practicable means by which [the University] could achieve its ends in the foreseeable future without the use of race-conscious measures." *Id.* at 376. Neither of those conclusions could be reached in this case.

First, as for the "sound basis" for the preferential classification based upon race, there is, as noted above, simply no "articulated purpose" to evaluate the need for Section 194. The specific "governmental objective" necessary "to justify such a classification" is nowhere shown. But even if one assumes that at the time of its initial adoption in 1822, Section 194 was a response to an Indian tribe's inability to effectively make use of the judicial system to protect its rights to property, that does not mean that the racial classification inherent therein continues to "serve important governmental objectives and [is] . . . substantially related to the achievement of those objectives." 438 U.S. at 359. Indeed, it cannot be seriously argued that the specific deprivation of rights that Section 194 sought to remedy still exists, notwithstanding other deprivations of rights and manifestations of racial discrimination that Indians may currently suffer and that may justify different remedial action.

Since the adoption of Section 194, fundamental changes have occurred with respect to an Indian tribe's legal status as well as with respect to its ability to participate in the litigation process. *See, McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172-73 (1973). The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1870), was a watershed in protecting the rights of *all* persons engaged in the litigation process and goes beyond

Section 194 in its extension of these rights not just to racial or ethnic minorities but to " 'all persons' including white persons." *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976). Statutory and other restrictions which existed in the nineteenth century on the ability of tribes to sue and to litigate effectively have long since been removed.[18] The very fact that the Omaha Indian Tribe has been represented by the United States and learned private counsel during this entire litigation demonstrates that means less extreme than the automatic application of the burden of proof on a purely racial basis is presently required to provide Indian tribes with proper protection.[19] Thus, the "race-conscious measures" of Section 194 cannot now be said to be the only "practicable means" by which Indian tribes can be given a fair opportunity to claim lands which they assert were once theirs.

That Section 194 no longer serves an "important governmental objective" is the most significant reason why the departure from normal constitutional requirements

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[18] *See generally*, F. COHEN, FEDERAL INDIAN LAW 283-85 (1942); J. APPLETON, RULES OF EVIDENCE 271-80 (1860).

[19] In a very recent opinion the Ninth Circuit refused to apply one of the traditional rules of construction in another situation where the Indian tribe had adequate representation:

> The rule of construction of ambiguous statutes in favor of Indians is based on a concern that the powerful not take advantage of the helpless and uneducated . . . . Where, as here, the Inupiats were represented before Congress by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark, we think the rule of construction operates with less force.

United States v. Atlantic Richfield Co., 612 F.2d 1132, 1139 (9th Cir. 1980).

cannot be sanctioned in this case. As noted by Mr. Justice Powell "the scope of the remedies [are] not permitted to exceed the extent of the violations." *Bakke, supra,* 438 U.S. at 300-01. Here where factors which one may presume led to passage of Section 194 no longer exist or have been eliminated by the securing for Indian tribes in other ways their rights to protect their land, the classification is not justified. As noted by Mr. Justice Blackmun in *Bakke*:

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is in truth, only a relic of the past . . . . At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

Id. at 403 (separate opinion). Section 194 is truly a "relic of the distant past." It should now be stricken as a symbol of a measure designed to deal with a condition "that is behind us."

The only judicial analysis of the constitutionality of Section 194 that has occurred to date was by the Court of Appeals in its initial opinion. In rejecting the defendants' contention that Section 194 was unconstitutional, that court erroneously relied upon the Court's statement in *Morton* v. *Mancari,* 417 U.S. 535, 554-55 (1974) that Indians may be "single(d) out . . . for particular and special treatment." 575 F.2d at 631, n.18.

It is well established that this Court will scrutinize "Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S.

73, 84 (1977). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946).[20] To the extent that *Mancari* suggests a different standard for equal protection review than the one articulated in the *Bakke* opinions discussed above, such a standard should not apply herein.

*Mancari* was the first of a recent series of opinions wherein the Court attempted to delineate an appropriate equal protection standard for Indian legislation. At issue in *Mancari* was whether an employment preference for qualified Indians at the Bureau of Indian Affairs ("BIA") contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.*, and constituted invidious racial discrimination in violation of the due process clause of the Fifth Amendment.

In determining that the employment preference at issue was proper, the Court found that the preference did not constitute "racial discrimination" nor even a "'racial' preference." 417 U.S. at 553. "Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government" because it was granted to Indians "as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554.[21]

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[20] As noted by Mr. Justice Powell in *Bakke*:

> It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.

438 U.S. at 295.

[21] Indeed, the Court analogized the preference to the requirement in art. I, § 3, cl. 3 of the Constitution that a United States Senator be "an Inhabitant of that State for which he shall be chosen." 417 U.S. at 554. *See also*, United States v. Antelope, 430 U.S. 641, 646-47 (1977).

This analysis was applied in *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam), where the Court held that members of the Northern Cheyenne Tribe could be denied access to the Montana state court for adoption proceedings that arose on a reservation and would be required to proceed in tribal court. Again, the Court held that there was no "impermissible racial discrimination" since "[t]he exclusive jurisdiction of the tribal court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Id.* at 390.

The integral relationship between the classification at issue and the "quasi-sovereign" status of Indian tribes discussed in *Mancari* and *Fisher* were specifically relied upon by the Court in the even more recent case of *United States* v. *Antelope*, 430 U.S. 641 (1977). There the Court upheld a federal criminal statute applicable to Indians which provided a more severe penalty than the comparable state statute applicable to non-Indians. The Court expressed the view that such federal legislation "is not based upon impermissible racial classifications," *Id.* at 645, but then went on to restate and explain the principles of *Mancari* and *Fisher*:

> Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of one-sovereign political communities; it is not to be

> viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ." *Morton* v. *Mancari, supra,* at 553 n.24, 94 S.Ct., at 2484.

*Id.* at 646-47.

Were Section 194 a rule of law applicable only in tribal courts or in the resolution of claims by a tribe against the government then, perhaps, the standard for reviewing an equal protection challenge as stated in *Mancari* would apply. But as a rule of general application in all courts and against all non-Indians (except states) "regardless of the circumstances," Section 194 cannot be said to be federal regulation of "Indian affairs" or of "Indian tribes," thereby "rooted in the unique status of Indians as a 'separate people' with their own political institutions." [22] Thus, the classification in Section 194 is "racial" rather than "political" requiring the most compelling justification for the preference to be sustained.

Further, even were the *Mancari* standard applicable, Section 194 cannot be reconciled with its underlying rationale. In *Mancari*, the Court would not disturb the legislative judgment establishing the preference as long as the preference was reasonable and could be "tied

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[22] This Court has recognized that the sovereign powers of Indian tribes have been implicitly divested when issues related to non-Indians are concerned:

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.

United States v. Wheeler, 435 U.S. 313, 326 (1978).

rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." 417 U.S. at 555.

In interpreting the meaning of Section 194, this Court suggested that the statute was originally designed for "preventing and providing remedies against non-Indian *squatters* on Indian lands." 442 U.S. at 667 (emphasis supplied). As the Court explained, "recurring trespass upon and illegal occupancy of Indian territory" underlay numerous early Congressional Indian Acts which provided for strong measures, including "the use of force," to prevent non-Indians from settling on tribal properties. *Id.* at 664. Obviously, there has been significant and positive change over the past one hundred sixty years in the means Indians have available for the protection of their rights to land. A dispute in 1980 in a federal court between Indians who base their claims on "prior possession" and non-Indians who assert their claims through a chain of title, and not as "squatters," is a far different circumstance than that which the Court suggested Congress contemplated in 1822 when it initially enacted the predecessor of Section 194. It is no more reasonable to allocate the burden of proof on the basis of race today than it would be to call upon the United States Cavalry to oust petitioners from the land.

The automatic assignment of the burden of proof may have once had a "rational tie" to a legitimate goal in the early years after its passage, when witnesses were still alive, the relevant documents were still in existence and the defendant was perhaps even the first non-Indian occupant of the land. However, in its present application, years "after the fact," such a "tie" is notably absent.[23]

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[23] *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legisla-

Thus, the conditions that caused Congress to enact Section 194 in 1822 and 1834 no longer exist. As a result, the long dormant Section 194 is no longer a rational exercise of legislative authority and its classification can no longer be viewed as a "non-racial" statute.[24]

## II. Section 194 is Unconstitutional Because it Impinges Upon a Fundamental Right.

Section 194 is subject to "strict scrutiny" on grounds other than equal protection alone. In *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. at 1, 17 (1973) the Court stated that when a statute impinges upon a "fundamental right explicitly or implicitly protected by the Constitution" it requires "strict judicial scrutiny." The Court has repeatedly held that the right to engage in the litigation process to protect one's interest in property is a fundamental right that exists at the very heart of due process.[25] In *Chambers* v. *Baltimore*

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tion."); *Cf.*, Perrin v. United States, 232 U.S. 478, 487 (1914) ("The conditions justifying the prohibition remain substantially the same as when [the statute] was adopted.").

[24] The Court's opinion interpreting the meaning of this statute held that artificial entities as well as the individual petitioners, but not states, "must necessarily be disadvantaged by § 194." 442 U.S. at 666-68. This second preferential classification inherent in the application of Section 194 also warrants constitutional review. In fact, there is no "principled basis" for a continuing classification of the burden of proof on any basis. As a result, the Court need not be called upon to impose its judgment in an area generally allocated to Congress. *See* Mathews v. Diaz, 426 U.S. 67, 84 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 (1977) (Stevens, J. dissenting).

[25] *See e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

*& Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) the Court stated:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

More recently, the Court emphasized that "the right to a meaningful opportunity to be heard . . . must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie* v. *Connecticut*, 401 U.S. 371, 379-80 (1971).

The fact that virtually the entire country was at one time in the possession of Indian tribes means that Section 194 could be urged to shift the burden of proof and persuasion to defendants (except states) in every Indian land claim case "regardless of the circumstances." If the claimants were other than an Indian tribe, their action would be barred by the state statute of limitations since those statutes are clearly applicable where no tribe is involved. However, to the extent that those statutes do not apply in cases brought by a tribe or by the United States, defendants must suffer the double burden of both defending against claims that normally would have been terminated long ago and proving facts respecting occurrences in the far distant past.

It should also be emphasized that this is not a situation where the person disadvantaged by the classification at issue has another, separate opportunity to exercise his due process right. The opportunity to defend the land claim is singular and exists only within the venue of the court. *See, Grant Timber & Manufacturing Co.* v. *Gray*, 236 U.S. 133 (1915). The fact that this due process right cannot be exercised elsewhere should have been considered by the Eighth Circuit before it allowed

this right to be so heavily encumbered.[26] The unreasoned shifting of this onerous burden to all of the current title holders except the State of Iowa upon the sole basis that the plaintiff is an Indian tribe deprives the due process clause of any substantive meaning.

Justice Frankfurter captured the essence of procedural due process when he wrote that:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and *opportunity to meet it.* Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

*Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J. concurring) (emphasis supplied). By imposing a difficult and often impossible burden of proof upon people who themselves are very far removed from the original evil sought to be protected by Congress, the "feeling . . . that justice has been done" is lost.

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[26] *See*, Boddie v. Connecticut, *supra*, at 375-76; *Cf.* United Jewish Organizations v. Carey, 430 U.S. 144, 165-66 (1977) (white voters not "fenced out" from the political process).

## CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1979

No. 79-1741

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson,

*Petitioners,*

No. 79-1744

R. G. P. Incorporated, Otis Peterson, and Travelers Insurance Company,

*Petitioners,*

No. 79-1779

State of Iowa and State Conservation Commission of the State of Iowa,

*Petitioners,*

vs.

Omaha Indian Tribe and United States of America,

*Respondents.*

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF GORDON DAHL AND 81 OTHER FARM OWNERS IN MONONA COUNTY AS AMICI CURIAE

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In The

# Supreme Court of the United States

October Term, 1979

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**No. 79-1741**

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Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson,

*Petitioners,*

**No. 79-1744**

R. G. P. Incorporated, Otis Peterson, and Travelers Insurance Company,

*Petitioners,*

**No. 79-1779**

State of Iowa and State Conservation Commission of the State of Iowa,

*Petitioners,*

vs.

Omaha Indian Tribe and United States of America,

*Respondents.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF GORDON DAHL AND 81 OTHER FARM OWNERS IN MONONA COUNTY AS AMICI CURIAE

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The 82 individual farm owners whose names are listed inside of the cover respectfully submit this brief as *amici curiae.* It is submitted in support of the petitions for writ of certiorari filed in this case on behalf of the above named petitioners to review the judgment and opinion of the U. S. Court of Appeals for the 8th Circuit entered on

January 15, 1980. All parties have signed a written consent to the filing of this brief pursuant to Rule 42.2.

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## STATEMENT

These amici adopt the sections of the Petitions of Petitioners Wilson, Lakin, Jackson, Sorenson, R. G. P., Incorporated, Otis Peterson, Travelers Insurance Co., State of Iowa and the State Conservation Commission of the State of Iowa entitled:

Opinions Below and of this Court
Jurisdiction
Questions Presented for Review
Constitutional and Statutory Provisions Involved, and
Statement of the Case.

In addition these amici supplement said Petitions with the following statement of their interests in this case and of their reasons this Court should grant the Petitions and review the decision of the Court of Appeals.

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## STATEMENT OF INTERESTS OF AMICI CURIAE

The interests of these amici were set out fully in the Brief of Gordon Dahl and 81 Other Farm Owners in Monona County (pp. 2-5) filed in support of the previous petitions for certiorari filed by Wilson, et al., R. G. P., Incorporated, et al., and the State of Iowa, et al. (Nos. 78-160, 161, and 162 reported at 442 U. S. 653, 99 S. Ct.

2529, 61 L. Ed. 2d 153 (1979)). Reference is made to the Statement of Interests in that brief which will not be repeated here. Briefly these amici are individual owners of family sized farms located in Iowa outside the original reservation as shown by the Barrett Survey. Many of these farms have been in amicis' families for generations with title in some instances originating in patents direct from the U. S. government. Their ancestors cleared, settled and developed these farms, which at the time of acquisition were in a wild and undeveloped state.

In its original action filed in 1975 (No. 75-4067), the Omaha Tribe named these amici as defendants along with present petitioners demanding that some 6,500 acres be taken from amici and given to the Tribe. The trial court severed that portion of No. 75-4067 involving amicis' land for subsequent trial, and it was not included in the trial nor before this Court in the cases designated Nos. 78-160, 161, and 162 on which writs of certiorari were previously granted. Thus amici have not yet had an opportunity to defend their property against the Tribe's claims, which still remain to be tried at a later date. They have watched the unsevered litigation which has gone forward against petitioners with great concern, as their own rights may be affected decisively by the manner in which the claims against petitioners are finally adjudicated. This is true even though the location of amicis' land, unlike that of petitioners in the present application, lies outside the Barrett Survey.

The amici are vitally interested in the granting of the present petitions for writ of certiorari for the following reasons:

1. There is a substantial danger that the decision of the Court of Appeals, if not reviewed by this Court, will prejudge, prejudice and destroy amicis' rights and in effect deprive them of their property without due process. This will have occurred while amici have been denied their right to trial of the claims against them by virtue of the trial court's having severed such claims and ordered that they will not be tried until final adjudication of the claims against petitioners.

2. The Court of Appeals' decision for which review is sought substantially ignores and evades long established state laws of accretion and avulsion upon which these amici and their families have relied for generations. Those rights were preserved by this Court in its decision in Nos. 78-160, 161 and 162 when it found the Court of Appeals should have incorporated Nebraska law in determining whether there had been accretion or avulsion and on remand ordered the Court of Appeals to consider whether the District Court had correctly interpreted Nebraska law and properly applied it to the facts. *Wilson v. Omaha Indian Tribe, et al.*, 442 U. S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979).

3. The Court of Appeals has failed to comply with the mandate of this Court upon remand in that it has not incorporated the standards of accretion and avulsion as decided by the Nebraska Supreme Court into its latest decision. Chief of these standards is the indispensable and long established requirement of avulsion that identifiable land must remain in place after an avulsion.

4. The constitutionality of 25 USC Sec. 194 is a question of significant national importance which merits consideration by this Court.

These amici are for the most part individual family farmers owning tracts whose average size is about 186 acres. Many are descendants of the first pioneers who settled western Iowa. When their ancestors purchased these lands in the late 19th and early 20th centuries they were on the Iowa side of the Missouri in a wild and undeveloped state. They cut timber, cleared the land and put it under cultivation for the first time. Through succeeding years their descendants have continued to develop and improve the land and increase its value. During this entire period in which the Iowa side of the river has been transformed from wilderness into some of the most valuable farm land in the U. S., the Omaha Indian Tribe has remained on the Nebraska side apparently uninterested in and certainly making absolutely no contribution to this remarkable improvement. The Tribe gave these amicis and their predecessors no indication of any claim to amicis' land until about the time this suit was filed in 1975. The filing of such suit has imposed heavy burdens on these amici ever since, casting a serious cloud on amicis' title, and making it difficult to sell land which has been readily salable for a hundred years. For the first time lending institutions have become reluctant to make loans on amicis' land, prospective buyers are looking elsewhere and land values are declining. These amici have had to bear the considerable cost of their defense unassisted, including attorney, engineers and surveyor fees. In contrast the Omaha Indian Tribe is enjoying a free ride in this litigation, with expenditures conservatively estimated at a half million dollars already made by the Department of Justice and Bureau of Indian Affairs, to be borne by the taxpayer. Amici are therefore vitally in-

terested in the granting of certiorari to enable this Court to subject Sec. 194 to constitutional scrutiny and review whether its mandate has been followed. This should be done *now* before further damage is done to amici and before they are forced to incur additional costs of defense which may in turn have to be duplicated if review by this Court is postponed until a later date.

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## REASONS FOR GRANTING THE WRIT

**1. The Court of Appeals' interpretation and application of 25 U. S. C. Sec. 194 if permitted to stand will affect the rights of all citizens who assert or resist Indian claims to property, real or personal, throughout the United States. The statute requires strict scrutiny as to its constitutionality because it is racially discriminatory on its face restricting fundamental rights of white persons. Whether it violates constitutional standards is an issue of major national significance which merits determination by this Court.**

In their brief submitted in support of earlier petitions for writ of certiorari, these amici urged that 25 U. S. C. Sec. 194, whose constitutionality had not been passed upon in 144 years, should now be reviewed by this Court for that purpose. The brief pointed out that the original decision of the Court of Appeals Appendix A. 20, 575 Fed. 2d 620, at p. 631, gave no serious consideration to the constitutional question, disposing of it in a single footnote citing only one case which amici contended was not in point.

*Morton v. Mancari,* 417 U. S. 535, 554-555 (1974). However, this Court limited its grant of certiorari to other questions and has not yet considered or ruled upon the constitutionality of Sec. 194. This should now be done.

These amici respectfully reiterate the argument stated on the issue of constitutionality at pp. 6 through 10 of their earlier brief. They urge that Sec. 194 constitutes invidious racial discrimination upon its face because it shifts the burden of proof from plaintiffs (where it has always rested) to white persons solely on the basis of their race and color. The statutory preference for Indians falls squarely within the definition of discrimination for its own sake which this Court has held the Constitution forbids.

> "Preferring members of any one group for no reason other than race or ethnic origins is discrimination for its own sake. This the Constitution forbids." *Regents of California v. Bakke,* 438 U. S. 265, 98 S. Ct. 2733, at p. 2757, 57 L. Ed. 2d 750 (1978).

Sec. 194 also falls within the definition in *Bakke* p. 2782 of a "statute which restricts 'fundamental rights' and therefore is to be subjected to 'strict scrutiny.'" Sec. 194 as now interpreted shifts the burden of proof to white persons in property disputes and thereby does indeed restrict their fundamental constitutional rights not to be deprived of property without due process (Fifth Amendment) and to equal protection of the laws (Fourteenth Amendment). It is difficult to imagine how any statute could be a more eligible candidate for the "strict scrutiny" promised in *Bakke* than is Sec. 194. The granting of a writ of certiorari is an appropriate vehicle for the kind of searching constitutional examination which *Bakke* requires. This will also afford ample opportunity to consider whether the

statute "furthers a compelling governmental purpose" sufficient to justify its being upheld on that ground (*Bakke* p. 2782).

As contended in amicis' earlier brief, the interpretation of Sec. 194 which arises from the present posture of this case would place great burdens on them in the defense of their own family farms. Notwithstanding the fact that their land lies outside the Barrett Survey and the Court of Appeals stated its application of Sec. 194 is not controlling as it affects their land, that Court also held open the danger that the section might be "applicable under different proof". See, *Omaha Indian Tribe v. Wilson, et al.*, 575 F. 2d 620, footnote 69 at p. 651, Appendix A65, 66.

Amici therefore face the possibility that if the constitutionality of Sec. 194 is not now reviewed, it may be used against them later depriving them of their property without due process. Such racial discrimination is proscribed by the following decisions of this Court:

> *Bolling v. Sharp*, 347 U. S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).
>
> *Weinberger v. Weisenfeld*, 42 U. S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975).
>
> *Washington v. Davis*, 426 U. S. 229, 240, 48 L. Ed. 2d 597, 607, 96 S. Ct. 2040 (1976).

The issue of constitutionality should be determined now rather than left to hover uncertainly over the as yet untried portion of No. 75-4065 involving 8,000 additional acres (6,500 of which are owned by these amici).

These amicis' need for constitutional review is urgent, substantial and direct. But it is dwarfed in comparison

with the greater national interest which will be served by the granting of a writ. Why is there a compelling national need for this Court to review the constitutionality of 25 U. S. C. Sec. 194 at this time? Because the section is so broad as to encompass all property disputes in which individual Indians or Indian tribes are involved everywhere in the United States. Not just land claims, but *property* of any description. In the eyes of lawyers representing Indians, this could range from a repossessed television set to entire states. All the Indian or tribe has to do to gain the preference and title presumption of the statute is to make a showing "of previous possession or ownership". In today's activist climate, lawyers are already claiming that Indians own the entire North American continent because parts of it were roamed ergo "possessed" by various aboriginal tribes. Whether this is right or wrong, it does point up the potential far-reaching impact of a statute which lay dormant from its enactment in 1834 until invoked by the Court of Appeals in this case. If that Court's interpretation and application of the statute is permitted to stand, it will affect the rights of all citizens who assert or resist Indian claims to property, real or personal, throughout the U. S. This makes it imperative that the petitions for writ of certiorari be granted to afford the necessary review of constitutionality at the highest judicial level.

**2. The Court of Appeals has not complied with the mandate of this Court that it should incorporate the law of Nebraska in determining whether there had been an avulsion or accretion. The Court of Appeals has instead in its decision persisted in attempting to justify and vindicate its earlier choice of federal common law independent of**

**state law. A writ should be granted to determine whether the mandate has been followed and if not to enable this Court to enforce its mandate.**

In its remand order this Court unequivocally directed the Court of Appeals to incorporate Nebraska law (which it had not followed in arriving at a federal standard) to determine whether there had been an avulsion or an accretion. This Court emphasized "the importance of attending to state law." App. 24, 442 U. S. 653, 99 S. Ct. 2529 at p. 2542, 61 L. Ed. 2d 153 (1979).

This Court clearly expressed its intention that state law should be controlling in any future consideration of the case rather than the federal common law which had been followed independent of state law by the Court of Appeals. This Court stated "we discern no imperative need to develop a general body of federal dispute". App. 21, 442 U. S. 653, 99 S. Ct. 2529 at p. 2541, 61 L. Ed. 2d 153 (1979). Surely state law in this context means state law as determined by the Nebraska Supreme Court and the task of correctly interpreting state law assigned to the Court of Appeals would require it to undertake a thorough and open-minded analysis of decisions of the Nebraska Supreme Court.

No such analysis appears in the decision which this Court is now requested to review. The only review of Nebraska cases appearing therein is designed to renew the suggestion that the Nebraska court has never evolved or enforced standards of accretion or avulsion of its own but has at all times merely followed the lead of the federal courts embracing federal common law in this respect. Rather than comply with the mandate to apply Nebraska

law the Court of Appeals seeks to justify and re-establish its earlier choice of federal common law. If Nebraska case law had been given the measured consideration it deserves, the Court of Appeals would accept rather than belittle standards of accretion and avulsion which have been established and consistently followed by the Nebraska Supreme Court, including the indispensable requirement that identifiable land must remain in place after an avulsion.

Instead the opinion below brushes identifiable land in place aside as if it had not been repeatedly and uniformly required by the Nebraska Court.

The following excerpts illustrate the opinion's down grading of the Nebraska court's ability to formulate and enforce its own standards while exalting a federal common law which purportedly dispenses with the requirement of identifiable land in place:

"Upon examination of Nebraska case law, we conclude Nebraska adheres to the *common law principles governing avulsion set forth in our earlier opinion.* (emphasis supplied) * * * Our prior analysis * * * finds full accord in Nebraska case law. Nearly all the earlier Nebraska cases we have examined rely upon these and other early federal cases for definitions of accretion and avulsion." App. 36, 37, 614 F. 2d 1153, 1156.

"The Nebraska Supreme Court's definition of avulsion is similar to *that set forth in our prior opinion as the federal standard* (emphasis supplied) in that it is not as narrow as the district court's reasoning would indicate." App. 40, 614 F. 2d at p. 1158. (The footnote cited in support of this statement contains nothing to suggest the Ne-

braska Supreme Court has ever failed to enforce the requirement of identifiable land in place. In fact, this footnote gives no real support to any of the statement for which it is cited.)

"The Nebraska cases indicate *Nebraska follows the basic common law principle:* avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of the stream, etc." (Emphasis supplied.) (App. 41, 614 F. 2d at p. 1158. (None of the Nebraska cases cited thereafter abandons identifiable land in place or states that an avulsion can occur *within* the riverbed.)

"We adhere therefore to our earlier holding that the district court erred in including within the definition of accretive change a sudden movement without evidence of identifiable land in place." 8 App. 42, 614 F. 2d at p. 1159. The footnote cites *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943) (vacating 141 Neb. 517, 4 N. W. 2d 290 (1942)) which the Court of Appeals states:

> "does not, we feel, represent a departure from the basic common law definitions. * * * Conkey II does mention absence of identifiable land, but nevertheless gives the basic common law definition of avulsion: 'Avulsion is the sudden and rapid change in the course and channel of a river.' " *Id.* at 10, 8 N. W. 2d at 541.

Conkey II did more than merely *mention* absence of identifiable land, it held expressly there can be no avulsion without identifiable land remaining in place.

"We conclude both Nebraska and federal common law apply the same basic definitions of avulsion and accretion to boundary disputes caused by a river channel change." App. 45, 614 F. 2d at p. 1160.

The above excerpts strongly indicate that the Court of Appeals was more interested in justifying and vindicating its earlier choice of federal common law than it was in "attending to state law" as mandated by this Court. Sufficient doubt exists as to whether the Court's mandate has been followed to justify issuance of a writ of certiorari.

> *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967).
>
> *Continental Insurance Co. v. U. S.*, 259 U. S. 156, 166 (1922).

A writ should be granted to enable this Court to determine whether its mandate has been followed and to take appropriate action to enforce said mandate if it has not.

**3. The Court of Appeals' decision fails to recognize and apply standards of accretion and avulsion under Nebraska state law which have been developed and confirmed over a period of many years in numerous decisions of the Nebraska Supreme Court. The most important of these standards is the avulsion requirement of identifiable land remaining in place.**

In its effort to justify its earlier choice of federal common law as the law of decision, the Court of Appeals has ignored and/or misinterpreted the following Nebraska cases (emphasis in all quotations is supplied):

> *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550 at p. 553 (1894).

In defining avulsion, the court cited the following quotation from Vattel with approval:

> "in the very uncommon case called 'avulsion', when the violence of the stream separates a considerable

part from one piece of land, and joins it to another, but in such a manner *that it can still be identified,* the property of the soil so removed naturally continues vested in its former owner." At p. 553. Emmerick Vattel, The Law of Nations, Principles of Natural Law Applied to the Conduct of Nations & Sovereigns (publ. 1758) Book 1, Chap. 22, Sec. 268-70.

*Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647, 648 (1935).

Defining avulsion thus:

"This means that suddenly, or by violent action of the elements, it leaves its old channel and creates a new one. In such cases the original thread of the stream continues to mark the limits of the two estates, and land which is so cut off can be followed *and identified,* and its title remains in the original owner." At p. 648.

*Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 610, 148 N. W. 328, 329 (1914) (requiring avulsed land must be detached from one bank and attached to the other "in such a way that it is *capable of identification".*)

*Wiltse v. Bolton, et al.,* 132 Neb. 354, 272 N. W. 197 (1937).

*Frank v. Smith,* 138 Neb. 382, 293 N. W. 329, 33 (1940) (defining avulsion as "the sudden and rapid change of the channel of the stream which is the boundary, whereby it *abandons its old* and *seeks a new bed."* At p. 33. Such definition is incompatible with the Court of Appeals' theory that avulsion can occur within the bed of a stream.)

*Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1920).

*First National Bank v. McFerrin,* 142 Neb. 627, 9 N. W. 2d 167, at p. 172 (1943) (repeatedly used

the words *identified, identifiable* and *identification* as necessary before finding an avulsion. Examples follow.)

"defendant adduced evidence that the lands in question cannot be *identified* as lands cut off from Nebraska by avulsion * * * the trial court erred in refusing to submit this controverted issue to the jury." At p. 172.

"the parties are in accord on the proposition that, if this is *identifiable* land cut off by avulsion, it never was * * * a part of the domain of the State of Iowa." At p. 169.

"The parties here do not question that at that time the land in issue here, if it was then subject to *identification,* was not within the Iowa boundaries." At p. 169.

All of the above Nebraska cases either (1) insist on identifiable land remaining in place as a prerequisite of avulsion or (2) state that avulsion occurs not within the bed of a stream but rather when the river changes to a new bed altogether. The decision of the Court of Appeals fails to cite any Nebraska case in point which reverses either of the above 2 fundamental propositions of Nebraska law. The closest the decision comes is to cite an island case, *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782 (1946), App. 39, 43, 614 F. 2d 1157, 1159, which falls within the well known island exception to the law of accretion. *Commissioner v. U. S.,* 270 F. 110, 113 (CA 8, 1920). This case on which certiorari is now sought is not an island case and the Court of Appeals has cited no authority to justify its novel theory that there may be an avulsion *within* the bed of the river by extending the island rule to a non-island situation. Neither this theory nor the decision's abandonment of identifiable land in place finds any support in the Nebraska cases.

A writ of certiorari should be granted to enable this Court to determine whether the decision below does indeed fail to incorporate Nebraska law as set forth in the above decisions.

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## CONCLUSION

For all the above reasons, these amici respectfully urge that the petitions in this case should be granted.

Respectfully submitted,

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